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Earl C. Tingey; Erie C. Boorman; attorneys for respondents.
James R. Black, Susan B. Diana; Black and Moore; attorneys for appellant.

Recommended Citation
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IN THE COURT OF APPEALS OF THE STATE OF UTAH

EMILIO ORTIZ,	:	
Appellant,	:	Industrial Commission No: 84000914
vs.	:	Utah Court of Appeals No.: 870527-CA
	:	Administrative Law Judge: Judge Timothy C. Allen
KENNECOTT COPPER CORP. (SELF-INSURED) and SECOND INJURY FUND,	:	Priority No.: 6
Respondent.	:	

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COURT OF APPEALS

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

EMILIO ORTIZ, Appellant, vs. KENNECOTT COPEER CORP. (SELF-INSURED) and SECOND INJURY FUND, Respondent.	: : : : :	Industrial Commission No: 84000914 Utah Court of Appeals No.: 870527-CA Administrative Law Judge: Judge Timothy C. Allen Priority No.: 6

JURISDICTION

This is an action for review and determination of the lawfulness of a denial of an award by the Industrial Commission of Utah. The Court of Appeals has jurisdiction by virtue of Utah Code Annotated Section 35-1-83.

NATURE OF THE PROCEEDINGS

This is a Petition for Review of the failure of the Industrial Commission of Utah to grant appellant's request for a hearing on his objections to the Medical Panel Report and to order him permanent total disability compensation.

STATEMENT OF THE ISSUES

The issues presented are as follows:

1) Whether is was improper and inappropriate for the Industrial Commission of Utah to disallow appellant's treating physician to testify at the evidentiary hearing.

2) Whether is was improper and inappropriate for the Industrial Commission of Utah to refuse appellant's request for a hearing on his objections to the Medical Panel Report.

3) Whether appellant had established his prima facie case that he was permanently and totally disabled due to the industrial accident in concert with other physical, experience, background and educational factors.

4) Whether appellant should have been referred over for a evaluation of vocational rehabilitation as requested.

DETERMINATIVE AUTHORITY

Statutes, cases and authorities believed to be determinative of the respective issues include Section 35-1-77 and 35-1-67, Utah Code Annotated and the following case authority: Brundage v. IML Freight, Inc. et al, 622 P.2d 790 (Utah 1980); Marshall v. The Industrial Commission of Utah, et al, 681 P.2d 208 (Utah 1984); Entwistle v. Wilkens, Utah, 626 P.2d 495 (1981); Norton v. Industrial Commission, 728 P.2d 1025 (Utah 1986); Hardman v. Salt Lake City Fleet Management, 725 P.2d 1323 (Utah 1986); Peck v. EIMCO Process Equipment Co., 73 Utah Adv. Rep. 26 (1987) 2 Larson, The Law of Workmen's Compensation Section, 57.51 at 10-164.24 (1983);

The statutes and cases mentioned herein are attached hereto in the addendum.

STATEMENT OF THE CASE

A. The Nature of the Case

This case involves Mr. Emilio R. Ortiz' claim for permanent total disability arising out of an industrial accident which occurred on February 19, 1976 while he was employed as a brakeman and heavy laborer at Kennecott Copper Corporation. The injury involved his lower back which eventually led to the need for back surgery.

He finally was able to return to his former employment on May 7, 1979. On April 9, 1980, he was awarded worker's compensation benefits due to the 1976 accident.

Although he was able to work, he suffered much pain and continued to seek medical care and treatment from 1979 through 1983. His condition worsened through the years. On April 3, and May 20, 1983, Mr. Ortiz was in relatively minor automobile accidents that involved injury to his lower back. These accidents aggravated his already severely impaired lower back he was unable to return to work.

His treating physician expressed the opinion that the automobile accidents were "the straws that broke the camel's back." However, Mr. Ortiz was unable to work primarily due to the industrial accident.

Mr. Ortiz applied for permanent total disability due to the industrial accident as well as his other physical impairments, lake of education, training, experience, english language ability and age.

B. Course of Proceedings

On April 9, 1980, the Industrial Commission of Utah entered an Order awarding Mr. Ortiz workers compensation benefits.

On October 30, 1984, he applied for permanent total disability compensation.

Evidentiary hearings were held on January 21, and November 6, 1985.

A Medical Panel was appointed and assigned to review the matter on December 18, 1986. The Panel issued it's report on February 20, 1986.

On March 7, 1986, Mr. Ortiz filed Objections to Medical Panel Report, Request for Hearing and Request for Rehabilitation Evaluation.

Administrative Law Judge Timothy C. Allen issued a Findings of Fact, Conclusions of Law and Order on March 24, 1986 denying Mr. Ortiz' motion.

Mr. Ortiz filed a Motion for Review from the above order on April 18, 1986.

The Industrial Commission of Utah issued its denial of Motion for Review on June 19, 1986. However, Mr. Ortiz and/or his attorney never received said denial even after several phone calls to the Commission to find out the status of Mr. Ortiz' Motion for Review until Mr. Ortiz went personally to the Industrial Commission on November 12, 1987.

Mr. Ortiz filed Notice of Appeal and/or Motion and Memorandum

in Support of Motion to Reopen and/or reconsider on November 25, 1987.

C. Disposition by the Industrial Commission

The Industrial Commission of Utah denied Mr. Ortiz' claim for permanent total disability, Request for Hearing on Objections to the Medical Panel Report and Request for Rehabilitation Evaluation.

RELEVANT FACTS

1. Emilio R. Ortiz while in the course of his employment with Kennecott Copper Corporation suffered an industrial accident on February 19, 1976. The accident occurred when the waste car he was operating failed to return to its normal position after dumping waste so Mr. Ortiz had to use an eight foot by twelve inch railroad tie weighing in excess of 100 lbs. to push the car back into proper position. (R. 21-23, 173)

2. The above described activity caused Mr. Ortiz to suffer a significant injury to his lower back which resulted in hospitalization on several occasions, surgery, and continued treatment through the present. (R. 173-174, 245)

3. On April 9, 1980, Administrative Law Judge Joseph C. Foley, entered on Order awarding applicant worker's compensation benefits with the following finding regarding applicant permanent partial impairment:

> 1. That the permanent partial loss of bodily function from all causes, including the industrial accident and pre-existing problems, is 25%.

2. That the permanent partial loss of bodily function attributable to cervical degeneration and trauma is 10% and wholly predated the industrial injury of February 19, 1976.

3. That the lumbar loss of bodily function is 15% with 10% of that predating the industrial accident and the remaining 5% directly attributable to the industrial accident and injury of February 19, 1976. (R. 177)

4. Mr. Ortiz returned to work at Kennecott on May 7, 1979 but, as the years progressed, he experienced continued problems and disability in his lower back for which he received medical care and treatment. (R. 180, 410-442, 245-250)

5. On April 3, 1983, Mr. Ortiz was on his way to work when he hit some black ice before he arrived at Copperton. His car spun three or four times and he eventually landed in a ditch. As a result, he had pain in his head, neck and low back. He also had a worsening of leg pain after this accident. He was seen by Dr. Wayne Hebertson on April 6, 1983 and at that time the doctor made arrangements to hospitalize him, which was accomplished on April 10, 1983. The applicant received an x-ray, CT scan, EKG, and EEG along with bed rest while in the hospital. He was subsequently discharged on April 15, 1985. The applicant started losing time from Kennecott on April 3, 1983 and has not worked since. (R. 250-253)

6. On May 20, 1983, the applicant was southbound on 200 South in his automobile, when a car ahead stopped which forced him to stop also. The car behind him did not see the applicant stopped, and so he rear-ended him, although the applicant stated that the car was not going very fast. The applicant had a lot of pain in his back again and had worsening of leg pain. He was

hospitalized on May 27, 1983 at the St. Mark's Hospital by Dr. Hebertson, and was given physical therapy, x-rays, and bed rest. (R. 253-256)

7. Subsequent to the accidents above, Mr. Ortiz made application for permanent total disability compensation since he is no longer able to work. (R. 256)

8. At the hearing, Mr. Ortiz submitted medical evidence from his treating physician, Dr. Wayne Hebertson, substantiating his claim that he is permanently totally disabled primarily due to his industrial accident. (R. 272-276)

9. It should be noted that Dr. Wayne Hebertson was present at the Evidentiary Hearing to discuss his opinions. Administrative Law Judge Timothy C. Allen advised Mr. Ortiz that Dr. Hebertson would not be allowed to testify and that he would be allowed to testify in the event of a hearing on applicant's Objections to the Medical Panel Report. (R. 224-235)

10. In addition to his lumbar spine problems, Mr. Ortiz has impairment due to his cervical spine. He has vision problems that render him blind in one eye and impaired in the other eye. He has only an elementary school education and is currently 59 years of age. He was born in Puerto Rico and his native tongue is Spanish. While he speaks English fairly well, he has difficulty writing or reading it. (R. 236-240)

11. The matter was submitted to a Medical Panel which rendered a report that stated his impairment from his industrial accident was the same. (R. 448-452)

12. Mr. Ortiz filed timely objections and requested a hearing. Administrative Law Judge Timothy C. Allen denied Mr. Ortiz's request for a hearing and denied him any benefits. (R. 453-455, 456-60)

13. Mr. Ortiz filed a timely Motion for Review to the Industrial Commission of Utah. (R. 465-471)

14. The Utah Industrial Commission denied Mr. Ortiz' Motion for Review dated June 19, 1986. (R. 472-475)

15. Mr. Ortiz and his attorneys never received the above described denial. Mr. Ortiz and his attorneys made several phone calls to Industrial Commission and were advised the Commission had not ruled. Mr. Ortiz finally obtained a copy by personally going to the Industrial Commission on November 12, 1987. (R. 510, 519)

SUMMARY OF THE ARGUMENT

It is Mr. Ortiz' contention that it was improper and inappropriate for the Industrial Commission to deny his Request for a Hearing on his Objections to the Medical Panel Report and a Request for Rehabilitation Evaluation.

It is also Mr. Ortiz' contention that based on all factors he is entitled to permanent total disability compensation under Utah case law.

ARGUMENT
POINT I

Mr. Ortiz is entitled to a hearing on his Objections to the Medical Panel Report and for Rehabilitation Evaluation

Mr. Ortiz submitted reports from Dr. Wayne Hebertson which read in part:

> Mr. Ortiz' current disability dated from the accident of April 6, 1983. He had not been able to work since that time. The condition was further aggravated by the accident of May 20, 1983. Both accidents were superimposed on a prior industrial accident in 1976. I think his original industrial condition was gradually getting worse. It would probably have been necessary for him to retire at some point, but the accident of last Spring did speed up this process. Mr. Ortiz previously had fifteen percent permanent-partial impairment due to lumbar degeneration and disc herniation. Ten percent of the lumbar impairment was residual from the work injury of February 15, 1976. The patient currently has permanent-partial impairment amounting to thirty percent from all causes. I could only estimate that of the additional fifteen percent impairment, approximately seven and a half percent would have to be attributable to each of the accidents in 1983. (emphasis added)

(R. 272-276)

> [It is my opinion that the patient's permanent partial impairment increased approximately five percent during the period from 1977 through November of 1982, including the fusion procedure done by Dr. Holbrook.] I also think that the industrial condition would have gradually increased leading to the patient's early retirement, even though he had not been involved in the automobile accident in 1983.

(R. 272-276)

Dr. Hebertson was, and is ready, willing and able to testify on Mr. Ortiz's behalf in this matter to his opinion that the industrial accident was the primary cause for his permanent total disability.

In his order, the Administrative Law Judge cites Utah Code Annotated 35-1-77 which read in part as follows at the time of Mr. Ortiz's industrial accident:

> . . .If objections to such report are filed it shall be the duty of the commission to set the case for hearing within thirty days to determine the facts and issues involved, and at such hearing and party so desiring may request the commission to have the chairman of the medical panel present at the hearing for examination and cross-examination. . . .
> (R. 456-60)

In 1982, this section was amended to read in part as follows:

> . . . If objections to such report are filed the commission may set the case for hearing to determine the facts and issues involved, and at such hearing any party so desiring may request the Commission to have the chairman of the medical panel present at the hearing for examination and cross-examination. . . .

The Administrative Law Judge stated in his order that he concludes the above amendment was a procedural rather than substantive change, thus, it was in his discretion whether to schedule a medical panel hearing. (R. 456-60)

Mr. Ortiz disagrees with his view. By not having a medical panel hearing, Mr. Ortiz has been denied his opportunity to cross-exam the doctor about his opinion. By not being allowed this opportunity, Mr. Ortiz cannot properly and reasonably test the credibility and sufficiency of the doctor's opinion. This is especially important in this case where Mr. Ortiz is being denied any additional compensation and yet, he nevertheless cannot work due to his medical condition. In addition, Mr. Ortiz presented competent, contrary medical evidence. Thus, both parties should be allowed to question the experts. Clearly, this is a substantive amendment rather than procedural when, in essence to

classify it otherwise denies Mr. Ortiz's application to received benefits.

POINT 2
Based on the "Odd-Lot" Doctrine, Mr. Ortiz should be awarded permanent total disability.

As was stated above, Mr. Ortiz suffers from many disabling conditions; namely,

a) lumbar spine impairment;

b) cervical spine impairment;

c) partial and total blindness of his eyes.

In addition, Mr. Ortiz has limited education and work experience. He has difficulty with the English language.

Dr. Hebertson in his reports stated Mr. Ortiz was going to have to retire soon because his lumbar spine disability was getting progressively worse due to his industrial accident.

Because of these conditions, Mr. Ortiz is entitled to permanent total disability compensation.

There are numerous cases in this jurisdiction as well as throughout the county that support Mr. Ortiz' contention that he is entitled to permanent total disability benefits under the "odd-lot" doctrine.

Perhaps the first case to discuss the concept of the "odd-lot" doctrine was the English case of Cardiff Corporation v. Hall, 1KB 1009 (1911):

> There are cases in which the burden of shewing suitable work can in fact be obtained does fall upon the employer. . .[If]. . .the capacities for work left to him fit him only for special uses and do not . . . make his powers of labour a merchantable article in some well

> known lines of the labour market . . . it is incumbent upon the employer to shew that such special employment can in fact be obtained by him . . .[I]f the accident leaves the workman's labour in the position of an "odd-lot" in the labour market, the employer must shew that a customer can be found who will take it. . .

Judge Cordozo very early in the history of workmen's compensation acts in the United States set the policy for odd-lot determination:

> He was an unskilled or common laborer. He coupled his request for employment with notice that labor must be light. The applicant imposing such conditions is quickly put aside for more versatile competitors. Business has little patience with the suitor for ease and favor. He is the 'odd-lot' man, the nondescript in the labor market. Work, if he gets it, is likely to be casual and intermittent . . . .Rebuff, if suffered, might reasonably be ascribed to the narrow opportunities that await the sick and the halt. (Emphasis Added)

The Utah Supreme Court has adopted the "odd-lot" doctrine in the field of worker's compensation in many recent decisions.

In Brundage v. IML Freight, Inc. et al., 622 P.2d 790, (Utah, 1980) plaintiff had spent thirty years as a truck driver. In August of 1975, he injured his back in a non-industrial accident, which led to surgery later that year. In October, 1976, he had recovered sufficiently so he returned to his job as a truck driver.

On June 18, 1977, Mr. Brundage injured his back during the course and scope of his employment while unloading potatoes from his truck in Madison, Iowa. On August 1, 1977, he again underwent surgery on his back. Following his surgery, his back steadily improved until December, 1977. At that time, he re-injured his

back after catching his heel on a rug in his home. He was unable to return to work thereafter.

The Utah Industrial Commission found Mr. Brundage suffered from an overall impairment of 30% - 15% of which was attributable to the industrial accident and 15% of which was attributable to nonindustrial causes. Mr. Brundage was awarded permanent partial impairment benefits accordingly. However, the Industrial Commission denied his claim for permanent total disability.

In reversing the Commissions' ruling regarding the permanent total disability, the Utah Supreme Court stated:

> In his treatise The Law of Workmen's Compensation, Professor Arthur Larson states:
>
> "Total disability" in compensation law is not be interpreted literally as utter and abject helplessness....The task is to phrase a rule delimiting the amount and character of work a [person] can be able to do without forfeiting his totally disabled status. 2 Larson, The Law of Workmen's Compensation Section 57.51 at 10-107. This Court has recognized the principle that a workman may be found totally disabled if by reason of the disability resulting from his injury he cannot perform work of the general character he was performing when injured, or any other work which a [person] of his capabilities may be able to do or to learn to do.... United Park City Mines Co. v. Prescott, 15 Utah 2d 410, 412, 393 P.2d 800, 801-802 (1964)

Another important recent decision is Marshall v. The Industrial Commission of Utah, et al. 681 P.2d 208 (Utah 1984). Appellant Marshall was employed by Emery Mining Company as a maintenance mechanic in a coal mine. On January 25, 1980, he was leaving the mine in a minetrip which is a tractor-trailer outfitted with wooden seats. As the minetrip was leaving the

mine, it ran over a large lump of coal causing Mr. Marshall to bounce up and down on the seat. The bounce caused Mr. Marshall to suffer an injury to his back.

After several months of conservative medical treatment, Mr. Marshall underwent surgery on his back. Although the surgery reduced his pain, he was advised by his doctor he could not return to work. Mr. Marshall was 67 years of age at the time.

The Industrial Commission awarded Mr. Marshall permanent partial disability compensation finding he sustained a 10% impairment due to the accident on January 25, 1980 and 15% due to pre-existing conditions. However, the Commission refused his request for permanent total disability stating the primary reason he was unable to return to work was his age.

The Utah Supreme Court reversed the Industrial Commission ruling Mr. Marshall was entitled to permanent total disability benefits under the "odd-lot" doctrine.

The Court defined permanent total disability as follows:

> [A] workman may be found totally disabled if by reason of the disability resulting from his injury he cannot perform work of the general character he was performing when injured, or any other work which a man of his capabilities may be able to do or to learn to do.....

681 P.2d at 211

The Court further stated:

> Disability is evaluated not in the abstract, but in terms of the specific individual who has suffered a work-related injury. An injury to a hand would not cause the same degree of disability in a teacher, for example, as it would in an electrician. Thus, in assessing the loss of earning capacity, a constellation

> of factors must be considered, only one of which is the physical impairment. Other factors are age, education, training and mental capacity. See Northwest Carriers v. Industrial Commission, supra, at 141; Morrison-Knudsen Const. Co. v. Industrial Commission, 18 Utah 2d 390, 424 P.2d 138 (1967). It is the unique configuration of these factors that together will determine the impact of the impairment on the individual's earning capacity.

681 P.2d at 211

In discussing the "odd-lot" doctrine, the Utah Supreme Court made the following observations:

> In Entwistle v. Wilkins, Utah, 626 P.2d 495 (1981), this Court stated total disability does not mean "that the injured employee must be unable to do any work at all."
>
> The fact that an injured employee may be able to do some kinds of tasks to earn occasional wages does not necessarily preclude a finding of total disability to perform the work or follow the occupation in which he was injured. His temporary disability may be found to be total if he can no longer perform the duties of the character required in his occupation prior to his injury.
>
> Id. at 498 (footnotes omitted) (emphasis added). some employees, although disabled with regard to their pre-injury occupation, may be rehabilitated and employed again. U.C.A., 1953, Section 35-1-67 requires that the employee must cooperate with the division of vocational rehabilitation and that the division must find that the employee may not be rehabilitated before the Industrial Commission can order permanent total disability benefits.
>
> [5,6] Some employees, however, cannot be rehabilitated and even though not in a state of abject helplessness "can no longer perform the duties...required in [their] occupations[s]." Entwistle, supra, at 498. These employees fall into the so-called "odd-lot" category.

> Under the odd-lot doctrine, which is accepted in virtually every jurisdiction, total disability may be found in the case of workers who, while not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well-known branch of the labor market. 2 Larson, The Law of Workmen's Compensation Section 57.51 at 10-164.24 (1983)

681 P.2d at 212

Finally, the Court pointed out that the majority of odd lot cases are concerned with employees whose work involved physical labor, were 50 years of age and older, and had moderate or little education similarly to Mr. Ortiz.

The most analogous case to the present case is Norton v. Industrial Commission, 728 P.2d 1025 (Utah 1986). Mr. Norton was employed as a coal miner for United States Steel Corporation in East Carbon, Utah for thirty nine years from the age of 16 until the age of 56. He was a physical laborer throughout those years. Norton was close to being illiterate.

On August 10, 1977, Mr. Norton sustained a serious injury when a pulley malfunctioned causing a cable to fall striking him on the neck. The doctors initially diagnosed his condition as a contusion and he was instructed to wear a soft collar. Mr. Norton returned to work the following week. Because of persistent pain, he was given a myelogram in December which showed a herniated disc at C5-C6 interspace and right shoulder traumatic bursitis. He also had nerve root irritation at C6-C7. Mr. Norton underwent traction and continued treatment, but declined surgery. He returned to his old job in heavy labor.

Norton, in spite of continued pain and discomfort, worked until March, 1983, five and one half years after his accident.

Prior to his industrial accident of August 10, 1977, Norton suffered a broken back at age 13 which resulted in degenerative disc disease, a fractured right ankle which resulted in severe arthritis, bilateral inguinal hernias, for which he had been in surgery three times, hyper acidity with history of duodenal ulcer and focal skin cancers. After the industrial accident, he developed additional impairments namely; tendovaginitis of the right little finger, pulmonary allergic bronchitis and hypertensive cardiovascular disease with cardiomyopathy aggravated by life-long obesity.

The Administrative Law Judge found Norton had a 14% whole man impairment pre-existing the industrial accident, 10% due to the industrial accident which resulted in a combined impairment of 23% and a overall impairment of 31%.

The Division of Vocational Rehabilitation found Norton was not a good candidate for rehabilitation. However, in spite of these factors, the Industrial Commission did not grant Norton's request for permanent total disability compensation noting that approximately 10% of his impairment post dated the industrial accident, that he continued to work for six years following the industrial accident and that his permanent total disability was not a consequence of the industrial accident.

Again, the Utah Supreme Court reversed the Industrial Commission's ruling. The Court, citing its previous ruling in

Hardman v. Salt Lake City Fleet Management, 725 P.2d 1323 (Utah 1986) held that the Industrial Commission had failed to carry out its responsibility in Norton. The Commission has the duty to not only consider physical impairment, but also such factors as age, sex, education, economic and social environment in determining whether an employee qualifies for permanent total disability compensation.

The Court further instructed the Industrial Commission:

> With respect to the administrative law judge's finding that Norton's continued work for six years was proof that he was not permanently totally disabled in 1983, it should be pointed out that the fact standing alone does not foreclose Norton's claim. The administrative law judge correctly considered Norton's return to work as one factor to be weighed in determining his disability. He erred when he failed to consider the condition under which Norton continued his employment, as manifested by his finding "the very fact that the applicant continued to work in underground mining for six years following his accident is convincing evidence that his accident did not render him permanently and totally disabled." Norton's decision to return to work did not automatically disqualify him from receiving permanent total disability benefits, where the facts indicate that throughout the remainder of his employ he was not restored to health. The evidence is undisputed that Norton spent the last six of his working years in considerable pain. Provided that a worker's disability was also analyzed within the framework of the odd-lot doctrine, case law dealing with the factor of substantial pain has generally held that "[a] worker who cannot return to any gainful employment without suffering substantial pain is entitled to compensation benefits for total disability." Comeaux v. Cameron Offshore Services, Inc. 420 So.2d 1209 (La.App.1982).
>
> The presence of substantial pain may logically cause an injured worker to fall into this odd-

> lot category, inasmuch as it directly affects the probable dependability with which the injured worker can sell his services in a competitive labor market, undistorted by such factors as business booms, sympathy of a particular employer or friends, temporary luck, or the superhuman efforts of the claimant to rise above his crippling handicaps.
>
> Calogero v. City of New Orleans, 397 So.2d 1252, 1254 (La.1980), modified 434 So.2d 177 (La.1983) (benefits affirmed on substantial pain theory alone), citing L.A. Larson, The Law of Workman's Compensation Section 10-164.49 (1980)

728 P.2d at 1027

Finally, the Court stated:

> Upon remand the Commission is required to address Norton's disability in light of all factors mentioned ante, and the burden will be on the employer to prove the existence of regular, steady work that Norton could perform, taking into account his age, limited education, and functional illiteracy, as well as his disabling pain. Contrary to the Commission's disclaimer noted in Northwest Carriers at 140, n.3, permanent impairment alone is never the sole or real criterion of permanent disability, and a denial of permanent total disability based on it alone invites reversal under well-settled stare decisis.

728 P.2d at 1020

Still another very recent case is most similar to the case under consideration. In Peck v. EIMCO Process Equipment Co. 73 Utah Adv. Rep. 26 (1987), Mr. Peck was employed as an industrial maintenance mechanic for defendant. He suffered two industrial injuries which resulted in permanent partial impairment. On September 12, 1980, he injured his right knee which required surgical repair and resulted in a 2% impairment. The second

injury occurred on December 29, 1982 to his lower back which also required surgical repair. It resulted in a 10% impairment. Mr. Peck was then 63 years of age.

Mr. Peck returned to work following his surgery with light duty restrictions on June 27, 1983. At age 65, he retired on April 28, 1984. He then requested he be found permanently, totally disabled and awarded compensation.

The Administrative Law Judge ruled "with great reluctance" that Peck's impairment due to the industrial accidents as well as his pre-existing impairments entitled him to permanent total disability compensation.

The Second Injury Fund filed a Motion for Review to the Industrial Commission. The Commission reversed the Administrative Law Judge and denied Peck permanent total disability compensation.

The Utah Supreme Court overruled the Industrial Commission's decision and reinstated the Administrative Law Judge's ruling citing approvingly the Norton, Marshall, and Hardman decisions.

The uncontroverted and clear evidence adduced in Mr. Ortiz' case demonstrates he is permanently and totally disabled as a consequence of his industrial accident and all other factors. The long line of Utah cases on this issue mandates the Utah Court of Appeals to find Mr. Ortiz is entitled to permanent total disability compensation.

CONCLUSION

Mr. Ortiz requests that he be found permanently totally disabled and awarded worker's compensation benefits accordingly.

In the alternative it is his contention that a hearing on his Objections to the Medical Panel Report be ordered and that he be referred for vocational rehabilitation evaluation.

DATED this 23 day of February, 1988.

/S/
James R. Black

/S/
Susan B. Diana

MAILING CERTIFICATE

I hereby certify that four true and correct copies of the above and foregoing Brief in Support of Appellant's Appeal was sent on the 23 day of February, 1988 to the following:

Earl C. Tingey
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Salt Lake City, Utah 84133

Second Injury Fund
Erie Boorman
160 East 300 South
Salt Lake City, Utah 84111

Industrial Commission
160 East 300 South
Salt Lake City, Utah 84145

and one copy was sent to the following:

Emilio R. Ortiz
143 North 700 West
Salt Lake City, Utah 84116

by /S/

ADDEDENDUM 1

basis upon which to compute the weekly compensation rate. After the weekly compensation has been computed, it shall be rounded to the nearest dollar.

History: C. 1953, 35-1-75, enacted by L. 1971, ch. 76, § 10; L. 1975, ch. 101, § 7; 1977, ch. 156, § 9; 1987, ch. 92, § 48.

Compiler's Notes. — The 1975 amendment substituted "divided" for "multiplied" in subd. (1)(b); redesignated the subsection paragraph beginning "If none of the methods ..." as subsec. (3); and added subsec. (4).

The 1977 amendment deleted "then be rounded to the nearest dollar and shall" after "it shall" in the first sentence of subsec. (4); and added the last sentence to subsec. (4).

The 1987 amendment corrected the subsection designations.

ANALYSIS

Choice of subsection.
Determination of amount.
Employee with more than one job.
Subsistence allowance.

Choice of subsection.

The question of which subsection of this section should be applied in a given case is a mixed question of law and fact on which the supreme court will defer to the discretion of the commission as long as its decision is reasonable and rational. Hodges v. Western Piling & Sheeting Co., 717 P.2d 718 (Utah 1986).

Determination of amount.

Finding that claimant intended to work only until he had earned $5,500 was supported by the evidence, even though claimant was working 40 hours per week at the time of his accident. Hodges v. Western Piling & Sheeting Co., 717 P.2d 718 (Utah 1986).

Employee with more than one job.

Where employee was employed at two separate jobs and was injured while working at one of the jobs, his weekly compensation rate was computed on the basis of the combined wages from his two employments. Produce v. Industrial Comm. of Utah (Utah 1983) 657 P 2d 1354.

Subsistence allowance.

Where the claimant worked at a jobsite that was distant from his home, and the employer paid him a subsistence allowance in addition to his regular wage, the subsistence allowance could not be included for the purpose of determining the claimant's average wage. Blake Stevens Constr. v. Henion (Utah 1985) 697 P 2d 230.

35-1-76. Likelihood of increase to be considered.

Limitation on expected wage increases.

Commission acted within its powers in limiting its consideration of adult worker's expected wage increases to the wage scale of the job worker held when injured rather than consider the wages he might have received for any job that he might have reasonably expected to hold after the injury when the compensation benefits awarded were what the worker had asked for in his original application for benefits. Probst v. Industrial Comm. (Utah 1978) 588 P 2d 717.

35-1-77. Medical panel — Discretionary authority of commission to refer case — Findings and reports — Objections to report — Hearing — Expenses.

Upon the filing of a claim for compensation for injury by accident, or for death, arising out of or in the course of employment, and where the employer or insurance carrier denies liability, the commission may refer the medical aspects of the case to a medical panel appointed by the commission and having the qualifications generally applicable to the medical panel set forth in section 35-2-56. The medical panel shall then make such study, take such X-rays

and perform such tests, including post-mortem examinations where authorized by the commission, as it may determine and thereafter make a report in writing to the commission in a form prescribed by the commission, and also make such additional findings as the commission may require. The commission shall promptly distribute full copies of the report of the panel to the applicant, the employer and the insurance carrier by registered mail with return receipt requested. Within fifteen days after such report is deposited in the United States post office, the applicant, the employer or the insurance carrier may file with the commission objections in writing thereto. If no objections are so filed within such period, the report shall be deemed admitted in evidence and the commission may base its finding and decision on the report of the panel, but shall not be bound by such report if there is other substantial conflicting evidence in the case which supports a contrary finding by the commission. If objections to such report are filed the commission may set the case for hearing to determine the facts and issues involved, and at such hearing any party so desiring may request the commission to have the chairman of the medical panel present at the hearing for examination and cross-examination. For good cause shown the commission may order other members of the panel, with or without the chairman, to be present at the hearing for examination and cross-examination. Upon such hearing the written report of the panel may be received as an exhibit but shall not be considered as evidence in the case except as far as it is sustained by the testimony admitted. The expenses of such study and report by the medical panel and of their appearance before the commission shall be paid out of the fund provided for by section 35-1-68.

History: L. 1951, ch. 52, § 1; C. 1943, Supp., 42-1-71.10; L. 1955, ch. 57, § 1; 1969, ch. 86, § 9; 1979, ch. 138, § 6; 1982, ch. 41, § 1.

Compiler's Notes. — The 1979 amendment substituted "applicant" for "claimant" in the third and fourth sentences; deleted "within thirty days" after "set the case for hearing" in the sixth sentence; and made minor changes in phraseology.

The 1982 amendment substituted "may" for "shall" in the first sentence; substituted "the commission may" in the sixth sentence for "it shall be the duty of the commission to"; and made minor changes in phraseology.

ANALYSIS

Function of medical panel.

It is the function of the medical panel to give the commission the benefit of its diagnosis relating to those matters within its expertise, and not to infringe upon commission's responsibility to decide the issues in a workmen's compensation case. IGA Food Fair v. Martin (Utah 1978) 584 P 2d 828.

Mandatory referral to panel.

This section is mandatory in its requirement that a medical panel shall be convened upon the filing of a claim for compensation for injury by accident, or for death, arising out of or in the course of employment when the employer or insurance carrier denies liability. Lipman v. Industrial Comm. (Utah 1979) 592 P 2d 616.

The provision requiring the submission of the medical aspects of the case, including those involving causation, to a medical panel is mandatory. Schmidt v. Industrial Comm. of Utah (Utah 1980) 617 P 2d 693.

Panel report as evidence.

Although all other evidence and testimony indicated that the plaintiff was totally disabled, report of the medical panel that plaintiff had suffered a 50% permanent partial disability is sufficient to support finding of industrial commission of a partial disability. Shipley v. C & W Contracting Co. (Utah 1974) 528 P 2d 153.

It is the duty of the commission to consider not only the medical panel report, but also all of the other evidence, and to draw whatever inferences and deductions that can be fairly and reasonably derived therefrom in reaching a decision on the issues. IGA Food Fair v Martin (Utah 1978) 584 P 2d 828.

Although medical panel report did not link employee's heart attack with the stress he had experienced four days earlier at his job, the commission's finding that there was a causal connection between the stress and the subsequent heart attack was neither arbitrary nor capricious and not without any substantial evidence to support it where a cardiologist testified that there was in fact a causal link between the stress and the heart attack Pittsburgh Testing Laboratory v Keller (Utah 1983) 657 P 2d 1367.

Qualifications of panel members.

Statutory requirement that medical panel member specialize in "treatment of the disease" was met where practice consisted of representing businesses and teaching, even though physician did not actually treat patients on an appointment basis. Edwards v Tillery (Utah 1983) 671 P 2d 195

Referral to panel

—Discretion.

As the evidence of the causal connection between an employee lifting a very heavy beam and the perforation of his ulcer was not uncertain or highly technical, the failure to refer the case to a medical panel was not an abuse of discretion. Champion Home Bldrs. v. Industrial Comm'n (Utah 1985) 703 P 2d 306.

Cited in Hone v J.F Shea Co., 728 P.2d 1008 (Utah 1986); Greyhound Lines v Wallace, 728 P.2d 1021 (Utah 1986)

35-1-78. Continuing jurisdiction of commission to modify award — Authority to destroy records — Interest on award.

The powers and jurisdiction of the commission over each case shall be continuing, and it may from time to time make such modification or change with respect to former findings, or orders with respect thereto, as in its opinion may be justified, provided, however, that records pertaining to cases, other than those of total permanent disability or where a claim has been filed as in 35-1-99, which have been closed and inactive for a period of 10 years, may be destroyed at the discretion of the commission.

Awards made by the Industrial Commission shall include interest at the rate of 8% per annum from the date when each benefit payment would have otherwise become due and payable.

History: L. 1917, ch. 100, § 83; C.L. 1917, § 3144; R.S. 1933 & C. 1943, 42-1-72; L. 1961, ch. 71, § 1; 1963, ch. 49, § 1; 1965, ch. 68, § 1; 1981, ch. 287, § 5.

Compiler's Notes. — The 1981 amendment added the last paragraph

ANALYSIS

ADDEDENDUM 2

35-1-67. Permanent total disability — Amount of payments — Vocational rehabilitation — Procedure and payments.

In cases of permanent total disability the employee shall receive 66⅔% of his average weekly wages at the time of the injury, but not more than a maximum of 85% of the state average weekly wage at the time of the injury per week and not less than a minimum of $45 per week plus $5 for a dependent spouse and $5 for each dependent minor child under the age of 18 years, up to a maximum of four dependent minor children not to exceed the average weekly wage of the employee at the time of the injury, but not to exceed 85% of the state average weekly wage at the time of the injury per week. However, in no case of permanent total disability shall the employer or its insurance carrier be required to pay weekly compensation payments for more than 312 weeks. A finding by the commission of permanent total disability shall in all cases be tentative and not final until such time as the following proceedings have been had: If the employee has tentatively been found to be permanently and totally disabled, it shall be mandatory that the industrial commission of Utah refer the employee to the division of vocational rehabilitation under the state board of education for rehabilitation training and it shall be the duty of the commission to order paid to the vocational rehabilitation division, out of the second injury fund provided for by Subsection 35-1-68 (1), not to exceed $1,000 for use in the rehabilitation and training of the employee; the rehabilitation and training of the employee shall generally follow the practice applicable under § 35-1-69, relating to the rehabilitation of employees having combined injuries. If the division of vocational rehabilitation under the state board of education certifies to the industrial commission of Utah in writing that the employee has fully cooperated with the division of vocational rehabilitation in its efforts to rehabilitate him, and in the opinion of the division the employee may not be rehabilitated, the commission shall order that there be paid to the employee weekly benefits at the rate of 66⅔% of his average weekly wages at the time of the injury, but not more than a maximum of 85% of the state average weekly wage at the time of the injury per week and not less than a minimum of $45 per week plus $5 for a dependent spouse and $5 for each dependent minor child under the age of 18 years, up to a maximum of four dependent minor children not to exceed the average weekly wage of the employee at the time of the injury, but not to exceed 85% of the state average weekly wage at the time of the injury per week out of the second injury fund provided for by Subsection 35-1-68 (1), for such period of time beginning with the time that the payments, as in this section provided, to be made by the employer or its insurance carrier terminate and ending with the death of the employee. No employee shall be entitled to any such benefits if he fails or refuses to cooperate with the division of vocational rehabilitation under this section.

All persons who are permanently and totally disabled and entitled to benefits from the second injury fund under Subsection 35-1-68 (1), including those injured prior to March 6, 1949, shall receive not less than $120 per week when paid only by the second injury fund, or when combined with compensation payments of the employer or the insurance carrier. The division of vocational rehabilitation shall, at the termination of the vocational training of the employee, certify to the industrial commission of Utah the work the employee is qualified to perform, and thereupon the commission shall, after notice to the employer and an opportunity to be heard, determine whether the employee has, notwithstanding such rehabilitation, sustained a loss of bodily function.

The loss or permanent and complete loss of use of both hands or both arms, or both feet or both legs, or both eyes, or of any two thereof, constitutes total and permanent disability, to be compensated according to the provisions of this section and no tentative finding of permanent total disability is required in those instances. In all other cases where there has been rehabilitation effected but where there is some loss of bodily function, the award shall be based upon partial permanent disability.

In no case shall the employer or the insurance carrier be required to pay compensation for any combination of disabilities of any kind as provided in §§ 35-1-65, 35-1-66 and this section, including loss of function, in excess of 85% of the state average weekly wage at the time of the injury per week for 312 weeks.

History: L. 1917, ch. 100, § 78; C.L. 1917, § 3139; L. 1919, ch. 63, § 1; R.S. 1933, 42-1-63; L. 1937, ch. 41, § 1; 1939, ch. 51, § 1; C. 1943, 42-1-63; L. 1945, ch. 65, § 1; 1949, ch. 52, § 1; 1951, ch. 55, § 1; 1955, ch. 57, § 1; 1957, ch. 62, § 1; 1959, ch. 55, § 1; 1961, ch. 71, § 1; 1963, ch. 49, § 1; 1965, ch. 68, § 1; 1967, ch. 65, § 1; 1969, ch. 86, § 5; 1971, ch. 76, § 6; 1973, ch. 67, § 4; 1974, ch. 13, § 1; 1975, ch. 101, § 5; 1977, ch. 150, § 1; 1977, ch. 151, § 3; 1977, ch. 156, § 6; 1979, ch. 138, § 2; 1981, ch. 286, § 1; 1983, ch. 356, § 1; 1985, ch. 160, § 1.

Compiler's Notes. — The 1975 amendment substituted "85% of the state average weekly wage" for "66⅔% of the state average weekly wage" four times in the first paragraph and once in the last paragraph; increased the minimum benefit per week from $35 to $45 in the first paragraph; inserted "not to exceed the average weekly wage of the employee at the time of the injury" twice in the first paragraph; increased the benefit per week from $50 to $60 at the end of the third paragraph (deleted by the 1977 amendment) and near the end of the fourth paragraph (deleted by the 1977 amendment); and substituted "July 1, 1975" for "July 1, 1974" in the fourth paragraph (deleted by the 1977 amendment).

The 1977 amendment by chapter 151 substituted "spouse" for "wife" in the first paragraph.

The 1977 amendment by chapter 156 made the same changes as the 1977 amendment by chapter 151; combined the first two paragraphs into one paragraph; inserted the second paragraph; and deleted the former third and fourth paragraphs which read: "Commencing July 1, 1971, all persons who are permanently and totally disabled and on that date or prior thereto were receiving compensation benefits from the special fund provided for by section 35-1-68(1) shall be paid compensation benefits at the rate of $60 per week.

"Commencing July 1, 1975, all persons who were permanently and totally disabled on or before March 5, 1949, and were receiving compensation benefits and continue to re

ADDEDENDUM 3

BRUNDAGE V. IML FREIGHT, INC.

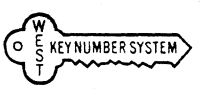
surveys were tied, was located in the same place during the time the surveys were made, therefore, the principle upon which defendants rely is inapplicable. Unless there is some basis for an estoppel, an adjoining landowner can generally by commissioning his own survey, challenge the accuracy of the boundary line established by another surveyor.[4] Under the survey accepted by the trial court, the boundaries of defendants' land coincide in length with those in the description in their deed.[5] Defendants have failed to establish any basis upon which they could claim title to a portion of plaintiffs' land.

[3] Defendants further contend the trial court erred in striking the testimony of one witness, Christensen. The witness was called by defendants to interpret the field notes of Aspen Engineering, the surveyor in 1970. During the trial, defense counsel stated that the witness was not called to testify as an expert surveyor but as an officer of Aspen Engineering, who had access to the business records, for the witness had not participated in the survey.

The field notes were already in evidence, and defense counsel's purpose in calling the witness was to have him interpret them. Since the witness was neither testifying as an expert nor had personal knowledge of the survey, the trial court did not err in striking his testimony.[6]

CROCKETT, C. J., and HALL and STEWART, JJ., concur.

WILKINS, J., heard the argument but resigned before the opinion was filed.



4. *Davis v. Davis*, 111 Utah 324, 178 P.2d 394 (1947); *Stratford v. Wood*, 11 Utah 2d 251, 358 P.2d 80 (1961).

Harley R. BRUNDAGE, Plaintiff,

v.

IML FREIGHT, INC., Special Fund of Utah, and The Industrial Commission of Utah, Defendants.

No. 16972.

Supreme Court of Utah.

Dec. 18, 1980.

Workers' compensation claimant appealed from order of the Industrial Commission which determined that he was suffering 30% permanent partial bodily disability. The Supreme Court, Wilkins, J., held that in face of testimony that claimant was unable to sit or stand for any prolonged period of time, among other restrictions, and that there was no occupation presently available to claimant, none of which evidence was contradicted, and in light of failure of defendants to show that plaintiff could obtain or perform the duties of employment of a special nature, the Commission could not have formed a bona fide opinion that plaintiff was not then incapable of reentering the labor market by reason of physical disabilities.

Remanded.

Hall, J., concurred specially and filed opinion.

1. **Workers' Compensation ⇐1939.11(9)**

Determination as to permanent disability is factual question for Industrial Commission to resolve, and that determination will not be set aside by the Supreme Court unless there is no substantial evidence in record to support it. U.C.A.1953, 35-1-84, 35-1-85.

2. **Workers' Compensation ⇐1377**

In face of evidence that plaintiff was unable to sit or stand for any prolonged period of time, among other restrictions, that all of the restrictions were permanent,

5. *Ovard v. Cannon*, Utah, 600 P.2d 1246 (1979).

6. See Rule 56(1), U.R.E.

.hat based on plaintiff's limitations was no occupation presently available aintiff, none of which evidence was adicted, it became incumbent upon dents in workers' compensation case to that plaintiff was able to secure ement of special nature not generally able or that he was able to perform s of such employment.

orkers' Compensation ⇐1639

n face of testimony that plaintiff was e to sit or stand for any prolonged d of time, among other restrictions, all of the restrictions were permanent, hat there was no occupation presently able to plaintiff, none of which evi- was contradicted, and in light of fail- f defendants to show that plaintiff obtain or perform duties of employ- of a special nature, Industrial Com- on could not have formed bona fide on that plaintiff was not then incapa- f reentering the labor market by rea- f physical disabilities. U.C.A.1953, 35–

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nes R. Black of Black & Moore, Salt City, for appellant.

bert B. Hansen, Atty. Gen., Frank V. n, Asst. Atty. Gen., Robert W. Brandt, Lake City, for respondent.

LKINS, Justice:

is is an appeal by Plaintiff Harley R. dage from an order of the Industrial nission which determined that he is ring a 30 percent permanent partial y disability. Plaintiff maintained be- the Commission and again on appeal he is permanently and totally disabled.

aintiff has spent thirty years of his life truck driver, the most recent 17 of n he was employed by Defendant IML ght, Inc. In August of 1975, plaintiff ed his back in an accident unrelated to mployment. In October of that year, derwent surgery to remove intervertedisc material at the L3–4 level in his

He recovered sufficiently from the ery to pass an Interstate Commerce Commission physical examination in October of 1976. He thereafter resumed his driving duties for IML.

On June 18, 1977, plaintiff again injured his back while unloading potatoes from his truck in Madison, Iowa. He completed his scheduled run to Chicago and was flown back to Salt Lake City from there the day following the accident. On August 1, 1977, he again underwent surgery on his back Following the surgery, plaintiff's condition steadily improved until December of 1977 At that time he reinjured his back after catching his heel on a rug in his home. He has been unable to return to work since then.

On November 20, 1978, plaintiff filed an application for hearing with the Industrial Commission. An initial evidentiary hearing was held before an Industrial Commission administrative law judge on January 25, 1979. Both plaintiff and a clinical psychologist, who had examined and tested plaintiff, testified. Following that hearing the administrative law judge referred plaintiff to Richard Olsen, a rehabilitation counselor with the Division of Rehabilitation Services, for the purpose of evaluating plaintiff's potential for rehabilitation and placement in a new occupation.

A second hearing was held on January 14, 1980. At that hearing two physicians who had examined plaintiff testified as to his physical condition and impairments. Mr. Olsen also testified as to his evaluation of plaintiff's prospects for rehabilitation and re-employment. Thereafter the administrative law judge entered his findings of fact, conclusions of law and order finding plaintiff 30 percent permanently partially disabled—15 percent of that disability attributable to nonindustrial causes and 15 percent to industrial causes—and ordered payment of certain benefits, but specifically found that plaintiff was not permanently and totally disabled.

On motion for review filed by plaintiff, the entire Commission upheld the administrative law judge. It did so with one Commissioner voting to uphold the order of the

administrative law judge, one Commissioner voting to reverse it and one Commissioner not participating.

[1] As this Court recently stated in the case of *Clark v. Interstate Homes, Inc.*:[1]

> It is fundamental that a determination as to permanent disability is a factual question for the Commission to resolve, and that determination will not be set aside by this Court unless there is no substantial evidence in the record to support it, *Evans v. Industrial Commission*, 28 Utah 2d 324, 502 P.2d 118 (1972); §§ 35-1-84 and 85, U.C.A. (1953), as amended.[2]

In his treatise *The Law of Workmen's Compensation*, Professor Arthur Larson states:

> "Total disability" in compensation law is not to be interpreted literally as utter and abject helplessness.... The task is to phrase a rule delimiting the amount and character of work a [person] can be able to do without forfeiting his totally disabled status.[3]

Consonant with the view expressed by Larson, this Court has adopted the following definition of total disability:

> This Court has recognized the principle that a workman may be found totally disabled if by reason of the disability resulting from his injury he cannot perform work of the general character he was performing when injured, or any other work which a [person] of his capabilities may be able to do or to learn to do...[4]

A review of the testimony heard by the administrative law judge reveals the following with respect to plaintiff's physical and occupational limitations. Dr. Wayne Hebertson, a neurologist, testified that plaintiff is unable to sit or stand for any prolonged period of time, is restricted in stooping or bending, should lift no more than 15 pounds and is restricted in walking and twisting. Doctor Hebertson testified that all of these restrictions are permanent and that because of the sitting and standing restrictions on plaintiff, it was difficult for the doctor to perceive that plaintiff might be able to engage even in sedentary vocations. Richard Olsen, the rehabilitation counselor, testified that based on plaintiff's limitations, there is no occupation presently available to plaintiff.

[2, 3] A review of letters from various consulting physicians also found in the record indicates that they are unanimous in believing that plaintiff cannot return to being a truck driver. Furthermore, some of these physicians also indicated that they considered plaintiff unemployable. In the face of such evidence, none of which was contradicted, it then became incumbent upon the defendants to show that plaintiff "is able to secure employment of a special nature not generally available or that he is able to perform the duties of such employment."[5] Defendants adduced no such evidence. Therefore there is no evidence in the record to support the finding of the administrative law judge that there was such special employment available to plaintiff. Here, as in the case of *Buxton v. Industrial Commission*,[6] "the Commission could not have formed a bona fide opinion that plaintiff was not then incapable of re-entering the labor market by reason of physical disabilities..."[7]

The order of the Industrial Commission is reversed. Section 35-1-67, Utah Code Annotated, 1953, as amended, prescribes the procedure which is to be followed in cases of permanent disability. That section requires that:

1. Utah, 604 P.2d 937 (1979).
2. Id. at 938.
3. 2 Larson, *The Law of Workmen's Compensation*, § 57.51 at 10-107.
4. *United Park City Mines Co. v. Prescott*, 15 Utah 2d 410, 412, 393 P.2d 800, 801-802 (1964), cited in *Clark v. Interstate Homes, Inc.*, supra, at 938. See, also, *Caillet v. Industrial Commission*, 90 Utah 8, 58 P.2d 760 (1936).
5. *Caillet v. Industrial Commission*, supra, 90 Utah at 15, 58 P.2d at 763.
6. Utah, 587 P.2d 121 (1978).
7. Id. at 123-124.

. . . a finding by the commission of permanent total disability shall in all cases be tentative and not final until such time as the following proceedings have been had: Where the employee has tentatively been found to be permanently and totally disabled it shall be mandatory that the industrial commission of Utah refer such employee to the division of vocational rehabilitation under the state board of education for rehabilitation training . . . If and when the division of vocational rehabilitation under the state board of education certifies to the industrial commission of Utah and in writing that such employee has fully co-operated with the division of vocational rehabilitation in its *efforts to rehabilitate him, and in the* opinion of the division the employee may not be rehabilitated, then the commission shall order that there be paid to such employee weekly benefits . . .

The record discloses that plaintiff was referred to the Division of Rehabilitation Services for a determination of whether he could be rehabilitated. Mr. Olsen testified that plaintiff could not be rehabilitated but the record does not contain a written certification of that fact as required by Section 35–1–67. Further, the question of allocation between defendant IML and the "special fund" of any additional benefits paid to plaintiff should be handled according to the dictates of Section 35–1–69.

This matter is accordingly remanded to the Commission for further proceedings consistent with this opinion and the requirements of the applicable statutes. Our disposition of this matter renders unnecessary discussion of the other points raised by plaintiff on appeal. No costs awarded.

CROCKETT, C. J., STEWART, J., and KENNETH RIGTRUP, District Judge, concur.

MAUGHAN, J., does not participate herein.

HALL, Justice (concurring specially):

I agree that it *tentatively* appears that plaintiff may be permanently and totally disabled. However, pursuant to U.C.A., 1953, 35–1–67, the *final* determination thereof is not to be made until such time as plaintiff has fully cooperated with the division of vocational rehabilitation in its efforts to rehabilitate him. Of course, benefits may only be paid at such time as, in the opinion of the division, the employee cannot be rehabilitated.

UTAH BANK & TRUST, a Utah Corporation, Plaintiff and Respondent,

v.

James H. QUINN and James H. Quinn, Jr., Defendants and Appellants.

No. 16788.

Supreme Court of Utah.

Dec. 29, 1980.

Creditor brought action against debtor and his guarantor for deficiency judgment after sale of debtor's inventory collateral. The Third District Court, Salt Lake County, Dean E. Conder, J., entered judgment for creditor, and debtors appealed. The Supreme Court, Wahlquist, District Judge, held that: (1) evidence in action by creditor for deficiency judgment after sale by creditor of debtor's used-car inventory, including fact that book value as applied to debtor's inventory was speculative, as the cars were "exotic," and would only receive book value if in excellent condition, which they were not, was sufficient to support finding that the sales were done in a reasonable manner; and (2) although creditor did not abide by Uniform Commercial Code requirement that it give written notice of sales of collateral to debtor, trial court did not err in determining, in lieu of automatically barring creditor from obtaining a deficiency judgment for failure to give notice of sales,

ENTWISTLE V. WILKINS

rigid application of the Uniform Stock Transfer Act to stock gifts and found appropriate "the more flexible rules of personal property law in ascertaining whether or not a gift was consummated." [214 P.2d at 115.] See also *McClements v. McClements*, 411 Pa. 257, 191 A.2d 814 (1963), in which the transfer of ownership on the corporate books along with evidence of donative intent satisfied the delivery requirement.

We are unpersuaded that the statutory requirements governing commercial stock transactions are conclusive in establishing the rights of parties involved in gift transactions, and we therefore hold that manual delivery of the stock certificates personally to Rod was not a prerequisite to a valid gift.

Viewing the facts of this case in light of the requirements of inter vivos gifts, we find the gifts of stock to Rod were complete and valid. Evidence of decedent's intention that Rod be made the owner of the stock in question during his lifetime was uncontroverted. Appellants do not challenge the sufficiency of the evidence as to donative intent nor the finding of the trial court that the change in ownership was recorded on the corporate books. New certificates were issued in Rod's name. The decedent did not thereafter exercise control over the stocks. On the contrary, Rod voted the stock as its legal owner and received cash and stock dividends.

The fact that the stock certificates were kept in a safe to which decedent, but not Rod, had access is not fatal to the finding of a completed gift. The decedent had physical possession of stock certificates belonging to a number of other Ross family members. There was no assertion or evidence that he exerted control or possessory rights over any of that stock. His custody of Rod's stock was simply consistent with the practice within the family businesses of keeping the stock certificates in a central location clearly identified as to the owners of the shares. Individual envelopes carried owners' names, stock certificate numbers, and the number of shares represented by the certificates.

We find no error in the trial court's interpretation of the evidence or its application of Utah law in reaching the conclusion that the inter vivos gifts to Rod were valid. This conclusion was based on evidence that not only meets the clear and convincing standard but is virtually undisputed.

Affirmed. Costs to Respondent.

MAUGHAN, C. J., and HALL, STEWART and OAKS, JJ., concur.

ENTWISTLE COMPANY and Home Insurance Company. Plaintiffs,

v.

Jerry M. WILKINS and Industrial Commission of Utah, Defendants.

No. 16879.

Supreme Court of Utah.

Feb. 26, 1981.

Employer and carrier sought reversal of order by Industrial Commission which awarded temporary total disability compensation to claimant for accidental injuries claimant suffered arising out of driving a truck for employer. The Supreme Court, Crockett, J., held that: (1) "total disability," with respect to a workers' compensation proceeding, does not mean a state of abject helplessness, or that the injured employee must be unable to do any work at all; fact that an injured employee may be able to do some kinds of tasks to earn occasional wages does not necessarily preclude a finding of total disability to perform the work or follow the occupation in which he was injured, and (2) evidence supported finding by Industrial Commission that claimant suffered a temporary total disability, despite fact that he did not re-

main completely idle during the relevant period, but spent some time in helping with a family business.

Affirmed.

Hall, J., dissented and filed opinion.

Croft, J., dissented and filed opinion.

1. Workers' Compensation ⇐863

Purpose of temporary disability compensation is to provide income for employee during the time of recuperation from his injury and until his condition has stabilized.

2. Workers' Compensation ⇐848

"Total disability," with respect to a workers' compensation proceeding, does not mean a state of abject helplessness, or that the injured employee must be unable to do any work at all; fact that an injured employee may be able to do some kinds of tasks to earn occasional wages does not necessarily preclude a finding of total disability to perform the work or follow the occupation in which he was injured.

See publication Words and Phrases for other judicial constructions and definitions.

3. Workers' Compensation ⇐1653

Evidence in workers' compensation proceeding, including testimony by claimant that following his work-related back injury, he was unable to perform the work required of a salesman, and that he was not trained to work in any other occupation, supported finding by Industrial Commission that claimant suffered a temporary total disability, despite fact that he did not remain completely idle during the relevant period, but spent some time in helping with a family business.

4. Workers' Compensation ⇐1723

Extent and duration of an employee's disability are questions of fact to be determined by the Industrial Commission.

5. Workers' Compensation ⇐1935, 1939.-4(4)

Supreme Court will review evidence in workers' compensation proceeding in the light most favorable to the Industrial Commission's findings, and when there is substantial evidence to support the facts as found by the Commission, its order will not be disturbed.

J. Kent Holland, Salt Lake City, for plaintiffs.

Paul R. Frischknecht, Manti, Robert B. Hansen and Frank V. Nelson, Salt Lake City, for defendants.

CROCKETT, Justice: *

Plaintiffs Entwistle Company and its insurer, Home Insurance Company, seek reversal of an order by the Industrial Commission which awarded temporary total disability compensation to the defendant Jerry Wilkins caused by an accidental injury suffered by him arising out of his driving a truck for plaintiff Entwistle.

Plaintiffs contend that after the defendant's injury and his subsequent termination of employment with plaintiff Entwistle, he performed work "of the same general character" during the period of time for which he was awarded the above compensation and that the award should not have been made.

The facts, as found by the Commission, are: The defendant, who is 55 years old, sold trailers and other types of recreational vehicles for plaintiff Entwistle. In that capacity, he regularly traveled throughout the western states contacting dealers. On April 15, 1977, near Portland, Oregon, his pickup truck and a trailer he was pulling were forced off the road and into a borrow pit by strong winds. To get back on the highway, the defendant had to unhitch the trailer. In doing so, he lost his balance, fell over and struck his back on some large rocks. This caused severe pain in his lower back and some numbness in his left leg. After a short rest, he was able to hook up the trailer and continue his trip.

The next day, the defendant informed his boss of the accident and indicated that,

* CROCKETT, J., wrote this opinion prior to his retirement

although he was injured and the trailer was damaged, he would complete the sales trip as scheduled. A week later, however, he notified his boss that he was in so much pain that he would return home earlier than scheduled.

The defendant arrived home on April 27 and continued to experience pain in his lower back. The next day, he was examined by a doctor who referred him to an orthopedic specialist. For the next three weeks, the defendant underwent physical therapy. He returned to work on May 20. At that time, he restricted his duties to contacting dealers by telephone. Nevertheless, when he was unable to do that because of continuing pain, plaintiff Entwistle terminated his employment.

The defendant applied for disability compensation and, after a hearing, the matter was referred to a medical panel.[1] The panel reported that the defendant has a condition of intermittent pain in his lower back and numbness in his left thigh and foot and that it is aggravated when he stands or sits for extended periods of time. The panel's opinion is that the defendant was temporarily totally disabled from April 15, 1977, until January 1, 1978, that his condition had then stabilized, and that there was a ten percent permanent loss of body function as a result of the accident.

Based on the above facts, the administrative law judge entered an order, dated October 25, 1979, awarding the defendant temporary total disability compensation of "$169 per week from April 15, 1977, to January 1, 1978, for a total of 37 weeks, 3 days for the sum of $6,325.43."[2] The plaintiffs filed a motion for review of that order.

It is important to have in mind that the plaintiffs do not complain of the ten percent permanent partial disability award, but their attack is upon the temporary total disability award, and that is the problem we are dealing with.

On December 11, 1979, the Commission amended the October 25 order, noting that between April 15 and May 23, the defendant received his regular salary and, thus, was not entitled to temporary disability benefits during that time. Consequently, the Commission made the appropriate adjustment by reducing the award by five weeks and two days. Nevertheless, the plaintiffs have persisted in contending that no award at all for temporary total disability was justified.

The basis of plaintiff's argument is that after the defendant's employment with plaintiff Entwistle ended, he performed identical work for a camper shell manufacturing company owned by himself and his son. They point to evidence that, during the summer of 1977, the defendant made two or three sales trips for that company and delivered camper shells to dealers who sold the company's products. They say that this conclusively shows that the defendant was able to perform work of the same general nature as he had before the accident and, thus, was not eligible for the temporary total compensation which he received.

[1] The purpose of temporary disability compensation is to provide income for an employee during the time of recuperation from his injury and until his condition has stabilized.[3] The question as to the degree of his disability on a temporary basis may be quite different than that question as to partial or total permanent disability. The law should not and does not encourage indolence by requiring that a man be completely idle in order to remain eligible for disability compensation. We have heretofore stated that:

> *a workman may be found totally disabled if* by reason of the disability resulting from his injury, *he cannot perform work of the general character he was performing when injured*, or any oth-

1. Pursuant to Sec 35-1-77, U C A 1953

2. The defendant was also awarded permanent partial disability compensation totaling $3,515 30

3. *Granado v Workmen's Comp Appeals Bd*, 71 Cal Rptr 678, 445 P 2d 294 (1968), *Taylor v State Accident Ins Fund*, 40 Or App 437, 595 P 2d 515 (1979), *Vetter v Alaska Workmen's Comp Bd*, Alaska, 524 P 2d 264 (1974)

er work which a man of his capabilities may be able to do or to learn to do.[4] But common sense dictates that there is less reason to expect that a man will readjust to different work during a period of temporary disability than he would on the permanent basis.

[2] As applied to the issue under consideration here, "total disability" does not mean a state of abject helplessness [5] or that the injured employee must be unable to do any work at all.[6] The fact that an injured employee may be able to do some kinds of tasks to earn occasional wages does not necessarily preclude a finding of total disability to perform the work or follow the occupation in which he was injured.[7] His temporary disability may be found to be total if he can no longer perform the duties of the character required in his occupation prior to his injury.[8]

[3–5] The defendant testified that, because of the pain he was experiencing, he could not perform the work required of a salesman and that he was not trained for work in any other occupation. The sales trips he made were infrequent and of short duration, usually for only one day; and thus, not comparable to the extended traveling of his regular employment. He said that his involvement with the family business consisted primarily of visits to the plant to assist with making out payrolls or paying bills. He did not consider his participation to be of any substantial consequence. The fact that he did not remain completely idle, but spent some time in helping with the family business is not inconsistent with the finding that his injury temporarily prevented him from performing his usual line of work. Significantly, as to when the defendant was able to return to work in any capacity, the medical panel reported as follows:

> The applicant was able to return to full-time work January 1, 1978. The members of the medical panel recognize that *this man was carrying out significant personal business a good part of the time* . . . and might by someone be considered during that time as being able to work part-time. *It is the opinion of the Panel, however, that he was substantially disabled for significant employment by another party during that period.* [All emphasis added.]

In considering the plaintiffs' attack upon the order made, we apply the principles which are established in such matters. The extent and the duration of an employee's disability are questions of fact to be determined by the Commission.[9] We review the evidence in the light most favorable to the Commission's findings,[10] and when there is substantial evidence to support the facts as found by the Commission, its order will not be disturbed.[11]

Affirmed. No costs awarded.

STEWART, and HOWE, JJ., concur.

4. *United Park City Mines Co. v. Prescott*, 15 Utah 2d 410, 393 P.2d 800, 801–802 (1964); *Morrison-Knudson Const. Co. v. Industrial Com'n.*, 18 Utah 2d 390, 424 P.2d 138 (1967).

5. *Thomas v. Industrial Com'n.*, 95 Utah 32, 79 P.2d 1 (1938). See *E. R. Moore Co. v. Industrial Com'n.*, 71 Ill.2d 353, 17 Ill.Dec. 207, 376 N.E.2d 206 (1978).

6. *Gulf Ins. Co. v. Gibbs*, Tex.Civ.App., 534 S.W.2d 720 (1976).

7. Larson, Workmen's Compensation, sec. 57.12. See *United States Gypsum Co. v. Rauh*, Okl., 318 P.2d 864 (1957); *E. R. Moore Co. v. Industrial Com'n.*, supra, note 5; *Firestone Tire & Rubber Co. v. Industrial Com'n.*, 76 Ill.2d 197, 28 Ill.Dec. 548, 390 N.E.2d 907 (1979); *Jones v. Arnold*, La.App., 371 So.2d 1258 (1979).

8. *Gulf Ins. Co. v. Gibbs*, supra, note 6.

9. *United Park City Mines Co. v. Prescott*, supra, note 4; *E. R. Moore Co. v. Industrial Com'n.*, supra, note 5.

10. Sec. 35-1-85, U.C.A.1953; *Vause v. Industrial Com'n.*, 17 Utah 2d 217, 407 P.2d 1006 (1965); *Duaine Brown Chevrolet Co. v. Industrial Com'n*, 29 Utah 2d 478, 511 P.2d 743 (1973); *Savage v. Industrial Com'n.*, Utah, 565 P.2d 782 (1977).

11. *Sanderson v. Industrial Com'n.*, 16 Utah 2d 348, 400 P.2d 756 (1965). That this rule also applies to the Commission's refusal to find

HALL, Justice (dissenting):

I of course agree that questions of fact are to be determined by the Commission. However, the record in this case reveals that none of the material facts are in dispute. The Commission was simply called upon to apply the law to those facts and thus determine whether defendant was totally disabled.

The services defendant performed for plaintiff Entwistle Company was the selling of trailers, which included sales trips to various dealers. The services he performed for himself and his son were sales of camper shells, which also included sales trips, although of lesser frequency and distance.

The legal test of total disability as announced by this Court in *United Park City Mines Company v. Prescott, et al.*,[1] is whether one can perform work of the *general character* he was performing when injured.

I am of the opinion that there is little distinction to be made between traveling for the purpose of making sales of *trailers* and performing like services in the sale of *camper shells*. Consequently, I find no substantial evidence in the record to support the conclusion of the Commission that defendant was *totally disabled*.

I would set aside the order of the Commission.

CROFT, District Judge (dissenting):

I concur in the dissent of Justice Hall that there is no substantial evidence in the record to support the conclusion of the Commission that defendant Wilkins was totally disabled following his accident of April 15, 1977, until January 1, 1978. I am satisfied that defendant was injured in his fall from the truck on April 15, 1977, with a resulting and recurring pain in his back in the weeks that followed. I am not satisfied that the injury resulted in any more than a temporary partial disability.

We are here dealing with the question as to whether the evidence presented to the Commission supports its finding of temporary total disability of Wilkins up to January 1, 1978.

Under our law, in case of temporary disability, the compensation provided for by statute is payable "so long as such disability is total."[1] I find no definition of "total disability" in our statutes. Whether an employee is totally disabled is an ultimate matter to be decided by the Commission.[2] The function of a medical panel is to give the Commission the benefit of its diagnosis relating to those matters within its expertise, and not to infringe upon the Commission's responsibility to decide the issue of total disability.[3]

What is "total disability"? I agree with Justice Crockett's statement that it does not mean a state of abject helplessness or that the injured employee must be unable to do any work at all. I do not agree that the test is met if the employee "can no longer perform the duties of a character required in his occupation prior to his injury."

99 C.J.S., Sec. 304(b), Workmen's Compensation, states that temporary total disability is the healing period or period during which "the claimant is unable to work and is totally disabled and recovery is reasonably expected." In *Caillet v. Industrial Commission of Utah*, 90 Utah 8, 58 P.2d 760 (1936), Justice Wolfe, in his dissenting opinion, said:

> Temporary total disability is founded on actual disability,

and further that total disability means

> disablement of the particular applicant to earn wages in the type of work (not just the particular work he did do) he was trained for or any other type of work

facts, see *Halvorson, Inc. v. Williams*, 19 Utah 2d 113, 426 P.2d 1019 (1967).

1. 15 Utah 2d 410, 393 P.2d 800 (1964).

1. Sec. 35-1-65(1), U.C.A.1953.

2. *Spencer v. Industrial Com'n*, 87 Utah 336, 40 P.2d 188 (1935).

3. *IGA Food Fair v. Martin*, Utah, 584 P.2d 828 (1978).

which a person of his mentality and attainments could do.

Justice Wolfe also stated that he did not think the doctors are competent to give testimony on whether an applicant is economically totally disabled.

It seems to me that in the case before this Court that is exactly what the medical panel did. In the quote from the medical panel report cited by Justice Crockett, it was stated that the panel recognized that defendant was carrying out significant personal business a good portion of the time, particularly following the fire (August 29, 1977), and undoubtedly some of the time prior to the fire, and might by someone be considered during that time as being able to work part-time, but that in the opinion of the panel, he was "substantially disabled" for significant employment by another party during that period. As was stated in *IGA Food Fair v. Martin* (supra), that impresses me as but "a gratuitous conclusion upon a matter of fact unrelated to its medical expertise."

Wilkins' activities before the fire noted by Justice Hall in his dissent involved traveling and making sales and deliveries of camper shells. This activity was terminated by the destruction of the business by fire, not by the pain defendant said he felt as he watched his business being destroyed by the uncontrollable flames. The examining physician's report on the pain felt after the fire was "recurrent back strain again today with the fire fighting and clearance of things."

The medical panel report recites that after the fire, and during September, October and November, Wilkins spent a good deal of time visiting bankers and doing other things trying to get back into business. No visits to the doctors occurred during those three months. A visit on December 30, 1977, to Dr. Pratt disclosed his problem then was "allergic rhinitis," which the dictionary [4] defines as an "inflammation of the nose or its mucous membrane." Dr. Pratt's pencilled notation for that date also appears to state that his left leg was "becoming worse, muscle deterioration," yet the medical panel found his period of total disability ended the next day.

I search the medical records of the two treating physicians in vain for any suggestion that defendant was totally disabled. At most, one finds medication and a week or so of rest as the prescribed treatments. His activities following the loss of his employment until the end of 1977 as disclosed by the record falls far short of the "actual disability" test suggested by Justice Wolfe. Nor do I think the record sustains a finding that defendant could not "perform work of a general character he was performing when injured, or any other work which a man of his capabilities may be able to do or learn to do." [5]

I would reverse the Commission's order and remand the case for further proceedings to determine Wilkins' entitlement, if any, under Section 35-1-66 to relief for partial disability.

MAUGHAN, C. J., does not participate herein; CROFT, District Judge, sat.

4. Random House Dictionary of the English Language, The Unabridged Edition

5. *Thomas v Industrial Com'n*, see footnote 5 in Justice Crockett's opinion

D. Dale WILLIAMS, Director, Department of Finance of State of Utah, Plaintiff and Appellant,

v.

UNIVERSITY OF UTAH, Defendant and Respondent.

No. 17000.

Supreme Court of Utah.

Feb. 27, 1981.

Plaintiff appealed from the Third District Court, Salt Lake County, Bryant H.

MARSHALL V. INDUSTRIAL COMMISSION OF UTAH, ET AL

form provided by a social worker for the department. These opportunities exceed what is necessary to contradict either one of the two essential elements of the *Ellis* exception: it was (1) "impossible" for the father to make a timely filing of the required notice (2) "through no fault of his own."

In apparent reliance on the *Ellis* statement that due process requires that the father be allowed to show "he was not afforded a reasonable opportunity to comply with the statute," the district court held that § 78–30–4(3) could not be applied to terminate the father's parental right in this case. Such an interpretation overlooks the fact that the "reasonable opportunity" referred to in the quoted sentence only applies "in such a case," i.e., when it is first shown that it was "impossible" for the father to file "through no fault of his own." Otherwise, the need to prove in each adoption case that the unwed father—whoever he may be—had a "reasonable opportunity" to file the required notice of paternity would frustrate the statute's purpose to facilitate secure adoptions by early clarification of status.

In *Lehr v. Robertson, supra,* the United States Supreme Court rejected a similar argument: that the unwed father should have received special notice of the adoption proceeding because, on the facts of that case, the trial court and the parties knew that he had filed a separate proceeding to establish his parental rights. The Supreme Court declared:

> This argument amounts to nothing more than an indirect attack on the notice provisions of the New York statute. The legitimate state interests in facilitating the adoption of young children and having the adoption proceeding completed expeditiously that underlie the entire statutory scheme also *justify a trial judge's determination to require all interested parties to adhere precisely to the procedural requirements of the statute.* .. Since the New York statutes adequately protected appellant's inchoate interest in establishing a relationship with Jessica, *we find no merit in the claim that his constitutional rights were offended because the family court strictly complied with the provisions of the statute.*

103 S.Ct. at 2995 (emphasis added). In applying that reasoning, the Court also noted that the right to receive notice of the adoption proceeding "was completely within appellant's control." *Id.*

We agree with the reasoning in *Lehr v. Robertson,* and we therefore hold that the agency correctly applied § 78–30–4(3) on the facts of this case and did not violate federal or state due process rights.

The judgment is reversed, and the case is remanded with directions to enter judgment for the defendants. Each party to bear own costs.

HALL, C.J., and STEWART, HOWE and DURHAM, JJ., concur.

Nolan W. MARSHALL, Plaintiff,

v.

The INDUSTRIAL COMMISSION OF the STATE OF UTAH, Emery Mining Co., (Employer), and/or the State Insurance Fund of Utah, and the Second Injury Fund, Defendants.

No. 19153.

Supreme Court of Utah.

April 5, 1984.

Mine employee denied permanent total disability benefits after work-related accident when he was 67 years old sought review of decision of the Industrial Commission denying him such benefits. The Supreme Court, Durham, J., held that: (1) total disability for workers' compensation

purposes does not mean total physical impairment, and (2) denial of permanent total disability benefits to mine employee, based almost entirely on size of employee's percentage of impairment and fact that employee was eligible to retire, rather than on evidence of employee's wage-earning capacity, was unsupported by the Commission's findings of fact, and would be set aside.

Reversed and remanded.

Hall, C.J., dissented and filed an opinion in which Howe, J., joined.

1. Workers' Compensation ⇐803

"Disability," under the worker's compensation laws, is loss of ability to earn. U.C.A.1953, 35-1-67.

See publication Words and Phrases for other judicial constructions and definitions.

2. Workers' Compensation ⇐836

An undisputed physical impairment may not always result in a disability for worker's compensation purposes

3. Workers' Compensation ⇐803

In assessing loss of earning capacity from an injury for workers' compensation purposes, a constellation of factors must be considered, only one of which is physical impairment of the worker; other factors are age, education, training and mental capacity.

4. Workers' Compensation ⇐847

Total disability, for workers' compensation purposes, does not mean total physical impairment. U.C.A.1953, 35-1-67.

5. Workers' Compensation ⇐847

Whether an employee falls into the odd-lot category, under which total disability for workers' compensation purposes may be found in the case of workers who, while not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well-known branch of the labor market, depends on whether there is regular, dependable work available for the employee, who does not rely on sympathy of friends or his own superhuman efforts.

6. Workers' Compensation ⇐1377

Once an employee who has suffered a work-related accident has presented evidence that he can no longer perform the duties required in his occupation and that he cannot be rehabilitated, the burden shifts to the employer to prove the existence of regular, steady work that the employee can perform, taking into account the employee's education, mental capacity, and age, to avoid finding that the employee is totally and permanently disabled under the odd-lot doctrine. U.C.A.1953, 35-1-67.

7. Workers' Compensation ⇐1947

Supreme Court may set aside an Industrial Commission's award in a workers' compensation case if the Commission's findings of fact do not support the award. U.C.A.1953, 35-1-84.

8. Workers' Compensation ⇐1653

Mine employee who injured his back in work-related accident at age 67, after a 40-year history of heavy labor in the mines, who had less than a high school education, and who presented uncontroverted evidence of his impairment and his inability to perform work required by his job, along with an opinion of the division of vocational rehabilitation that he could not be rehabilitated, presented a prima facie case that he fell into the odd-lot category for an award of workers' compensation, even though his combined impairment totaled only 26%. U.C.A.1953, 35-1-67.

9. Workers' Compensation ⇐1639

Where Industrial Commission's denial of permanent disability benefits to 67-year-old mine worker injured in a work-related accident appeared to rest almost entirely on size of employee's percentage of impairment and on fact that employee was eligible to retire, rather than on evidence of employee's wage-earning capacity, such denial of permanent total disability benefits was unsupported by findings of fact. U.C.A.1953, 35-1-67, 35-1-84.

Virginus Dabney, Salt Lake City, for plaintiff.

David L. Wilkinson, Atty. Gen., Salt Lake City, for Indus. Com'n.

Gilbert A. Martinez, Salt Lake City, for Second Injury Fund.

James R. Black, Salt Lake City, for State Ins. Fund.

DURHAM, Justice:

This case is a writ of review from the Industrial Commission of the State of Utah. The appellant, Nolan W. Marshall, was employed by the defendant, Emery Mining Company, as a maintenance mechanic in a coal mine. On January 25, 1980, the appellant was leaving the mine in a minetrip, which is a trailer with wooden seats pulled by a tractor. The minetrip rolled over a large lump of coal and the plaintiff was bounced up and then down on the seat, injuring his back. The appellant sought medical treatment on January 28, receiving medication for pain. He attempted physical therapy, but discontinued the treatment because of additional pain. During this time the appellant continued to work, but stopped in early March. On March 17, 1980, the appellant underwent surgery, a two-space lumbar laminectomy, after a diagnosis of acute lumbar disc. The operation was successful in reducing the appellant's pain, but in July the appellant's doctor noted he was still in discomfort and recommended the appellant not return to mine work. The appellant was then 67 years old.

The appellant received temporary total disability payments from March 1, 1980, to November 14, 1980. On July 9, 1982, the appellant was notified that his application for rehabilitation training was denied by the Division of Rehabilitation Services because there was no "reasonable expectation that vocational rehabilitation services may benefit the individual in terms of employability." In October 1982, a medical panel reviewed the appellant's file and determined that he had sustained a 10% permanent physical impairment as a result of the accident on January 25, 1980. The appellant had some previous physical impairment, and his combined impairment totaled 26%. The defendant State Insurance Fund is liable for 10% of that rating; the defendant Second Injury Fund is responsible for the remaining 16%. The findings of the medical panel were adopted by the administrative law judge, who denied permanent total disability status, but awarded workmen's compensation benefits for the January 25, 1980 injury. The findings of fact stated that "it appears to the Administrative Law Judge that [the appellant's] prime reason for being unemployed at the present time is age rather than physical impairment." The defendant Industrial Commission affirmed the order of the administrative law judge. The appellant seeks reversal of the ruling and a determination that he is entitled to permanent total disability benefits.

In his brief the appellant asserts that the Industrial Commission erred in denying him permanent total disability benefits because of his age. He argues that the permanent total disability statute, U.C.A., 1953, § 35–1–67 (Supp.1983), does not require his physical impairment to be the primary factor in his disability. The defendants cannot point to a statutory requirement in rebuttal, but argue that case law establishes a pattern of a minimum percentage of loss of bodily function necessary to support a decree of permanent total disability. The defendants cite cases affirming denials of benefits to employees whose percentage of disability was greater than the appellant's and conclude that a 26% impairment is insufficient for a determination of permanent total disability. Furthermore, the defendants allege the evidence shows that the appellant's January 1980 injury had little affect on his employability and that his decision to retire was voluntary.

[1, 2] At the outset, we note that the purpose of the worker's compensation acts is "to secure workmen ... against becoming objects of charity, by making reasonable compensation for calamities incidental

to the employment ...." *Henrie v. Rocky Mountain Packing Corp.*, 113 Utah 415, 427, 196 P.2d 487, 493 (1948). This compensation is not in the form of damages for injury, as in a tort action, but in the form of payments to compensate for the *loss of employability* resulting from the injury. *See, e.g., Northwest Carriers v. Industrial Commission*, Utah, 639 P.2d 138 (1981); 2 Larson, The Law of Workmen's Compensation § 57.11 (1983). Thus, the Utah worker's compensation statutes key the amount of the weekly payment not merely to the medical nature of the injury, but to a percentage of the worker's average weekly wages, reflecting the economic impact of the injury on the particular individual. *See* U.C.A., 1953, §§ 35-1-66, -67 (Supp.1983). With regard to permanent total disability claims, this Court has stated:

> [A] workman may be found totally disabled if by reason of the disability resulting from his injury *he cannot perform work* of the general character he was performing when injured, or any other work which a man of his capabilities may be able to do or to learn to do ....

United Park City Mines Company v. Prescott, 15 Utah 2d 410, 412, 393 P.2d 800, 801-02 (1964) (emphasis added) (footnote omitted). Disability is the loss of ability to earn. *See, e.g., Ashley v. Blue Bell Inc.*, Ala.Civ.App., 401 So.2d 112 (1981); *Smith v. Carolina 'Footwear, Inc.*, 50 N.C.App. 460, 274 S.E.2d 386 (1981). Confusion occurs when the word "disability" is used to describe a medical condition more properly referred to as "impairment" or "physical impairment." *See Northwest Carriers v. Industrial Commission, supra*, at 140 n. 3. For example, it would have been more accurate if the above quotation had read: "[A] workman may be found totally disabled if by reason of the *impairment* resulting from his injury he cannot perform work." However, an undisputed physical impairment may not result in a disability. *See, e.g., Matthews v. Industrial Commission*, Colo.App., 627 P.2d 1123 (1980) (when a loss of taste and smell does not affect employability, there can be no award for disability); *Tafoya v. Leonard Tire Co.*, 94 N.M. 716, 616 P.2d 429 (N.M.App.1980) (nondisabling pain is not compensable because physical impairment is not the same thing as disability); *Winn Dixie Stores, Inc. v. Linthicum*, Fla.App., 376 So.2d 909 (1979) (a lump on the side resulting from a work-related injury did not diminish the claimant's earning capacity and thus an award of disability benefits was improper).

[3] Disability is evaluated not in the abstract, but in terms of the specific individual who has suffered a work-related injury. An injury to a hand would not cause the same degree of disability in a teacher, for example, as it would in an electrician. Thus, in assessing the loss of earning capacity, a constellation of factors must be considered, only one of which is the physical impairment. Other factors are age, education, training and mental capacity. *See Northwest Carriers v. Industrial Commission, supra*, at 141; *Morrison-Knudsen Const. Co. v. Industrial Commission*, 18 Utah 2d 390, 424 P.2d 138 (1967). It is the unique configuration of these factors that together will determine the impact of the impairment on the individual's earning capacity.

[4] A few examples illustrate why this is so. Consider a 25-year-old court reporter who suffers a 20% hearing loss in a work-related accident. His total physical impairment is slight, but he is now unemployable in the profession for which he was trained. However, at 25 and in otherwise good health, he is an excellent candidate for rehabilitation and retraining. He returns to college and several years later is able to begin a new career in a different field. The Commission could reasonably find a temporary total disability followed by a permanent partial disability. On the other hand, if the court reporter had been 60 when his hearing impairment occurred, his prospects for retraining would not be favorable. Depending on his health, mental capacity and other experience, his 20% loss of hearing could be the basis for finding him totally disabled, i.e., unemployable as a result of his impairment. In contrast, the heavy equipment operator who suffers the same hearing loss may experience little, if any, loss of wage earning capacity. Thus,

total disability does not mean total physical impairment. In *Entwistle v. Wilkins*, Utah, 626 P.2d 495 (1981), this Court stated total disability does not mean "that the injured employee must be unable to do any work at all."

> The fact that an injured employee may be able to do some kinds of tasks to earn occasional wages does not necessarily preclude a finding of total disability to perform the work or follow the occupation in which he was injured. His temporary disability may be found to be *total if he can no longer perform the duties of the character required in his occupation prior to his injury.*

Id. at 498 (footnotes omitted) (emphasis added). Some employees, although disabled with regard to their pre-injury occupation, may be rehabilitated and employed again. U.C.A., 1953, § 35–1–67 requires that the employee must cooperate with the division of vocational rehabilitation and that the division must find that the employee may not be rehabilitated before the Industrial Commission can order permanent total disability benefits.

[5, 6] Some employees, however, cannot be rehabilitated and even though not in a state of abject helplessness "can no longer perform the duties ... required in [their] occupation[s]." *Entwistle, supra*, at 498. These employees fall into the so-called "odd-lot" category.

> Under the odd-lot doctrine, which is accepted in virtually every jurisdiction, total disability may be found in the case of workers who, while not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well-known branch of the labor market.

2 Larson, The Law of Workmen's Compensation § 57.51 at 10–164.24 (1983) (footnote omitted). Whether or not an employee falls into the odd-lot category depends on whether there is regular, dependable work available for the employee who does not rely on the sympathy of friends or his own superhuman efforts. Once the employee has presented evidence that he can no longer perform the duties required in his occupation and that he cannot be rehabilitated, the burden shifts to the employer to prove the existence of regular, steady work that the employee can perform, taking into account the employee's education, mental capacity and age. 2 Larson, *supra*, 10–164.-51 to 10–164.54 and cases cited.

> A considerable number of the odd-lot cases involve claimants whose adaptability to the new situation created by their physical injury is constricted by lack of mental capacity or education. This is a sensible result, since it is a matter of common observation that a man whose sole stock in trade has been the capacity to perform physical movements, and whose ability to make those movements has been impaired by injury, is under a severe disadvantage in acquiring a dependable new means of livelihood.

Id. at 10–164.54 to 10–164.63 (footnotes omitted). A majority of the odd-lot cases are concerned with employees whose work required physical labor, and many of those employees were 50 years old or older with moderate or little education. *See, e.g., Halstead Industries v. Jones*, Ark.App., 603 S.W.2d 456 (1980) (affirming total permanent disability benefits to a 59-year-old illiterate laborer with a 15% physical impairment); *Laughlin v. City of Crowley*, La. App., 411 So.2d 708 (1982) (54-year-old sanitation worker with little education who was unable to return to heavy labor found totally and permanently disabled under "odd-lot" doctrine when employer was not able to show that there was work available); *Matter of Compensation of Livesay*, 55 Or.App. 390, 637 P.2d 1370 (1981) (affirming total disability benefits to 43-year-old laborer with a seventh-grade education and no special skills whose injuries left him with restricted movement, limited strength and an inability to sit or stand for any length of time); *Smith v. Asarco, Inc.*, Tenn., 627 S.W.2d 946 (1982) (affirming award of total disability benefits to 65-year-old miner with a sixth-grade education who was physically able to do sedentary work in a clean environment). As stated above, once the employee has demonstrated his impairment and presented evidence that he is no longer capable of performing his former work and that he cannot be rehabili-

tated, the burden shifts to the employer to show that regular work is available. In *Brown v. Safeway Stores, Inc.*, 82 N.M. 424, 483 P.2d 305 (1970), the court of appeals stated: "It is much easier for the [employer] to prove the employability of the [employee] for a particular job than for the [employee] to try to prove the universal negative of not being employable at any work." *Id.* at 427, 483 P.2d 305, 483 P.2d at 308. *See also Employers Mutual Liability Insurance Co. of Wisconsin v. Industrial Commission*, 25 Ariz.App. 117, 541 P.2d 580 (1975); *Transport Indemnity Co. v. Industrial Accident Commission*, 157 Cal.App.2d 542, 321 P.2d 21 (1958); *Lyons v. Industrial Special Indemnity Fund*, 98 Idaho 403, 565 P.2d 1360 (1977); *Hill v. U.S. Plywood-Champion Co.*, 12 Or.App. 1, 503 P.2d 728 (1972).

[7, 8] This Court may set aside the Commission's award if the Commission's findings of fact do not support the award. U.C.A., 1953, § 35-1-84. In the instant case, the appellant is a miner with less than a high school education who has a 40-year history of heavy labor in the mines. He presented uncontroverted evidence of his impairment, his inability to perform the work required by his job and the opinion of the division of vocational rehabilitation that he could not be rehabilitated. He also testified that prior to his injury he had fully intended to continue to work rather than to retire. Thus, the appellant presented a prima facie case that he falls into the odd-lot category. The defendant Commission did not require the defendant employer to demonstrate the availability of regular work the appellant could perform, nor did any of the defendants present evidence indicating that the appellant had any reasonable wage earning capacity. As we have discussed, benefits are awarded on the basis of disability, not physical impairment. It appears the Commission's award in this case rested almost entirely on the size of the appellant's percentage of impairment and on the fact that appellant was eligible to retire, rather than on evidence of the appellant's wage-earning capacity.

[9] Therefore, we find that the denial of permanent total disability benefits is unsupported by the Commission's findings of fact, and we reverse. We remand this matter to the Commission for further proceedings consistent with this opinion, which may include further evidence on the question of disability as defined herein or merely a recomputation of benefits based on total disability at the discretion of the Commission. Costs are awarded to the appellant.

STEWART and OAKS, JJ., concurring.

HALL, Chief Justice (dissenting):

Plaintiff's contentions of error attack the sufficiency of the evidence to support the order of the Commission. This Court's standard of review in such cases is as was recently stated in *Kaiser Steel Corp. v. Monfredi:* [1]

> [T]he reviewing court's inquiry is whether the Commission's findings are "arbitrary and capricious" or "wholly without cause" or contrary to the "one [inevitable] conclusion from the evidence" or without "any substantial evidence to support them." Only then should the Commission's findings be displaced. [Bracketed language in original.]

The record before us contains substantial evidence to support the conclusion reached by the Commission that plaintiff's 26 percent permanent partial impairment rating did not rise to the level of permanent total disability simply because it occurred at a time when plaintiff was 69 years of age and eligible for retirement.

Following plaintiff's injury and subsequent surgery, his condition improved, and his doctor considered him ready for work. Both the medical panel and the attending physicians were in agreement that plaintiff's condition had stabilized and that he was free from pain. The medical panel also observed that plaintiff's "upper extremity motion was normal for age." Furthermore, plaintiff was performing yard work and other household tasks.

1. Utah, 631 P.2d 888 (1981)

Plaintiff's injury occurred in January of 1980, and Dr. Lamb followed his condition closely over the next few months. On August 27, 1980, he observed: "He [plaintiff] did heavy work in the mine and probably shouldn't return to this for a couple to three months yet." During a subsequent examination, plaintiff advised Dr. Lamb that he was "in the process of retiring."

The record adequately supports the conclusion that plaintiff's decision to retire was voluntary and the natural result of his age rather than his inability to perform further work. His doctor simply suggested that he retire because of his age, and he did so. Plaintiff testified that miners customarily retire between the ages of 60 and 70. He further testified that upon his retirement he became the recipient of social security retirement benefits (as distinguished from disability benefits) and that he was also receiving a pension from his labor union.

I would affirm the order of the Commission.

HOWE, J., concurs in the dissenting opinion of HALL, C.J.

Moroni PERRY, dba Perry's Mill and Cabinet Shop, Third-Party Plaintiff and Appellant,

v.

PIONEER WHOLESALE SUPPLY COMPANY, a Utah corporation, and Paine Lumber Company, Inc., a corporation, Third-Party Defendants and Respondents.

No. 18657.

Supreme Court of Utah.

April 16, 1984.

Subcontractor, who was sued by general contractor for breach of contract for installing defective doors, brought third-party action for indemnity against the supplier and manufacturer of the doors. The Fifth District Court, Iron County, Robert F. Owens, J., granted summary judgment for manufacturer and supplier, and subcontractor appealed. The Supreme Court, Oaks, J., held that: (1) trial court was correct in rejecting the general statute of limitations for actions on contracts; (2) subcontractor's amended third-party complaint would not relate back to date general contractor's action was brought; and (3) language of the Uniform Commercial Code containing limitations period for actions based on breach of warranty in contracts for the sale of goods indicates an intent that there be repose from all actions based on breach of warranty that are brought more than four years after tender of delivery of the goods; thus, indemnity action brought by subcontractor against supplier and manufacturer six years after purchase of the goods was properly dismissed.

Affirmed.

1. Statutes ⇐223.4

When two statutory provisions appear to conflict, the more specific provision will govern over the more general provision.

2. Statutes ⇐223.4

Where Uniform Commercial Code sets forth a limitation period for a specific type of action, this limitation controls over an older, more general statute of limitations.

3. Statutes ⇐223.4

As the more specific statute, section of the Uniform Commercial Code, providing that actions for breach of warranty on a contract for the sale of goods must be commenced within four years after delivery of the goods, prevailed over the general six-year limitation period for an action upon a contract in writing, and thus, the UCC was the applicable statute of limitations for purchaser's cause of action for breach of

HARDMAN V. SALT LAKE CITY FLEET MANAGEMENT

197, 202 (Utah 1985) (Zimmerman, J., dissenting).

The change of circumstances question here is a close one. Most of the facts recited in the majority opinion could not support a finding of a change of circumstances. They reflect little more than the not uncommon physical mobility and economic misfortune that befall many in our society. In my view, only the fact of the mother leaving the child with the father for most of the time after the initial custodial award is pertinent to the standard set out in *Becker:* "The asserted change must ... have some material relationship to and substantial effect on parenting ability [of the custodial parent] or the functioning of the presently existing custodial relationship." 694 P.2d at 610; *accord Shioji v. Shioji,* 712 P.2d at 200. The mother's failure to take active custody of the child after custody was awarded to her does have a "material relationship to and substantial effect on ... the functioning of the ... custodial relationship" set up by the initial custody order.

The trial court's initial custody order necessarily anticipated that the mother would assume physical custody of the child and that she would act to solidify the bond that should exist between the custodial parent and the child and to provide the stability in caregiving that is one of the principal purposes of a one-party custodial arrangement. *See Moody v. Moody,* 715 P.2d at 510 (Zimmerman, J., concurring); *Fontenot v. Fontenot,* 714 P.2d at 1133; *Shioji v. Shioji,* 712 P.2d at 202 (Zimmerman, J., dissenting). Instead, the trial court found that she left the child with the father almost all the time. This probably had the effect of creating stability in the child's life and of bonding the child with the primary caregiver, but not the one contemplated by the court's order. I conclude that the mother's actions have resulted in a change of circumstances not contemplated by the court at the time of the initial award and that this change meets the requirements set forth in *Becker.*

Once the trial court properly found a change of circumstances, it was entitled to weigh all the evidence in determining the placement that would be in the best interests of the child. U.C.A., 1953, § 30-3-10 (Repl.Vol. 3C, 1984); *Williams v. Williams,* 655 P.2d 652, 653 (Utah 1982); *Hogge v. Hogge,* 649 P.2d at 54. A factor that should be given heavy weight in such an analysis is the child's interest in maintaining a stable placement. *Moody v. Moody,* 715 P.2d at 510 (Zimmerman, J., concurring); *Shioji v. Shioji,* 712 P.2d at 202 (Zimmerman, J., dissenting). The court's order had the effect of leaving the child in his existing placement. Absent a strong showing that this was not the best arrangement for the child, I am not persuaded that the trial court abused its discretion.

DURHAM, J., concurs in the concurring opinion of ZIMMERMAN, J.

George Archie HARDMAN, Plaintiff,

v.

SALT LAKE CITY FLEET MANAGEMENT and Second Injury Fund, Defendants.

No. 20133.

Supreme Court of Utah.

Sept. 8, 1986.

Industrial Commission denied permanent total disability benefits to employee for industrial injury. Employee sought review. The Supreme Court, Howe, J., held that employee who suffered from partial physical disability and from continuous headaches, dizziness, nausea, and fainting and who was almost 60 years old with limited education and work background es-

tablished prima facie case of tentative permanent total disability before Industrial Commission.

Reversed and remanded.

1. Workers' Compensation ⇐803

"Disability" is worker's impairment of earning capacity and does not refer to percentage of physical impairment.

See publication Words and Phrases for other judicial constructions and definitions.

2. Workers' Compensation ⇐1378

Employee who has been referred to Division of Vocational Rehabilitation upon Industrial Commission's tentative finding of permanent total disability has burden to establish inability to be rehabilitated through cooperation of Division. U.C.A. 1953, 35–1–67.

3. Workers' Compensation ⇐1377

Employer's burden to prove existence of regular, steady work that can be performed by employee arises after Division of Vocation Rehabilitation certifies that employee cannot be rehabilitated. U.C.A. 1953, 35–1–67.

4. Workers' Compensation ⇐847

Showing that there is regular, dependable work which is available to and can be performed by employee is required to defeat tentative finding of permanent total disability. U.C.A.1953, 35–1–67.

5. Workers' Compensation ⇐1639

Employee who suffered from partial physical disability and from continuous headaches, dizziness, nausea, and fainting and who was almost 60 years old with limited education and work background established prima facie case of tentative permanent total disability before Industrial Commission. U.C.A.1953, 35–1–67.

Ann L. Wassermann, Salt Lake City, for plaintiff.

Ray L. Montgomery, Asst. City Atty., Salt Lake City, for the City.

Lena Hunsaker, Salt Lake City, for Risk Management.

Gilbert Martinez, Salt Lake City, for Second Injury Fund.

HOWE, Justice:

Plaintiff George Archie Hardman seeks review of an order of the Industrial Commission denying him permanent total disability benefits for an industrial injury.

On October 1, 1981, while plaintiff was employed by defendant Salt Lake City, he suffered a fractured skull when a steel beam fell and struck him on the head. He spent nine days in the hospital, and an operation was performed on his skull to relieve the pressure on his brain. Subsequently, several evaluations were made of his physical and emotional condition. His attorney asked the Industrial Commission to make a finding of tentative permanent total disability by taking into consideration factors additional to Hardman's physical impairment, such as his age and lack of education or skills. After a hearing on October 5, 1983, the administrative law judge submitted the matter to a medical panel consisting of a neurologist and a psychiatrist. The panel was asked to assess the extent of Hardman's disability and determine whether there was a causal connection between the injury he sustained and the disability he then claimed. The panel found that Hardman had been temporarily totally disabled from October 1, 1981, until July 1, 1982, and that he had a permanent physical impairment totalling twenty-five percent, broken down as follows: fifteen percent for neuropsychiatric syndrome of post-concussion type, five percent for the earlier amputation of the left second finger, and five percent for persistent intermittent and unexplained pain in the left shoulder.[1] The administrative law judge found that the City had paid $18,351.43 in temporary total disability compensation to Hardman from October 2, 1981, to April 15,

1. Evidence about the likelihood of plaintiff having had a previous heart condition was offered, although this was not a consideration in the Commission's findings.

1983, in addition to the payment of medical bills totalling $7,081.12. The judge determined that because Hardman's temporary total disability ended July 1, 1982, he had been overpaid by the City for temporary total disability from July 1, 1982, to April 15, 1983, in the sum of $9,177.44. Applying that overpayment to Hardman's permanent partial disability entitlement which was awarded him, the City owed him a balance of $959.44, which it subsequently paid.

Our standard of review of the Industrial Commission's findings of fact in workmen's compensation cases is well-settled. We are limited to determining whether the Commissions's findings are supported by substantial evidence. *Higgins v. Industrial Commission of Utah*, 700 P.2d 704, 706 (Utah 1985); *Kennecott Corp. v. Industrial Commission*, 675 P.2d 1187, 1192 (Utah 1983); *Kaiser Steel Corp. v. Monfredi*, 631 P.2d 888, 890 (Utah 1981); *Kent v. Industrial Commission*, 89 Utah 381, 385, 57 P.2d 724, 725 (1936).

Plaintiff contends that he met his burden of proof and presented a prima facie case of tentative permanent total disability to the Commission. The Workers' Compensation Act establishes a procedure by which a finding of permanent total disability may be determined. U.C.A., 1953, § 35-1-67,[2] provides in pertinent part:

> A finding by the commission of permanent total disability shall in all cases be tentative and not final until such time as the following proceedings have been had: If the employee has tentatively been found to be permanently and totally disabled, it shall be mandatory that the industrial commission of Utah refer the employee to the division of vocational rehabilitation under the state board of education for rehabilitation training....

The Act does not set forth, however, those often unquantifiable factors that establish permanent total disability, even on a tentative basis. We are therefore compelled to examine the law as it has evolved within the framework of our cases. This Court has stated, with regard to permanent total disability claims, that a worker may be found totally disabled if he can no longer perform work of the general nature he was performing when injured, or "any other work which a man of his capabilities may be able to do," or to learn to do or for which he might be trained. *United Park City Mines Co. v. Prescott*, 15 Utah 2d 410, 412, 393 P.2d 800, 801-02 (1964).

The record and the transcript are replete with statements from qualified medical personnel to the effect that plaintiff would most likely be unable to return to similar work. The neurosurgeon who treated him rated his permanent partial disability at twenty-seven percent. In fact, his own doctor stated that statistically approximately one-third of the persons who experience significant head injuries continue to have disabilities, mainly headaches and dizziness, which prevent them from returning to work. Dr. Moench, a psychiatrist who examined the plaintiff, expressed doubts that he could ever "return to his previous level of employment." At the hearing, plaintiff testified that he continued to suffer from severe headaches and episodes of light-headedness, dizzy spells, and pain in his left shoulder. Plaintiff, a man in his late fifties, also testified that he had only a sixth-grade education and had been a manual laborer most of his life.

The medical panel's psychiatric examiner diagnosed plaintiff as suffering from an accident-caused "post-concussion syndrome which is characterized by impairment of memory, problems of coordination [and] emotional disturbances." The panel's rating of his disability, however, reflected only his physical impairment. It did not take into consideration the extent to which his physical impairment, compounded by other factors, could render him totally disabled.

2. Although the section has been subsequently amended, this language has remained substantially unchanged.

[1] The Commission, by adopting the findings of the medical panel as its own, failed to carry out its task. It appears to have confused the percentage of *impairment*, a determination which the medical panel is qualified to make, with the percentage of *disability*, including factors *in addition* to the physical impairment, which it is the Commission's duty to determine. In workmen's compensation law, the *disability* is the worker's impairment of earning capacity. *Northwest Carriers, Inc. v. Industrial Commission of Utah*, 639 P.2d 138 (Utah 1981). The Commission's findings failed to acknowledge the odd-lot doctrine accepted in most jurisdictions and which has been repeatedly approved by this Court. That doctrine recognizes the substantial difference between physical impairment and disability. For example, a low percentage of physical impairment is not *per se* less than total permanent disability. Numerous other courts applying the odd-lot doctrine have found permanent total disability despite a deceptively low percentage of physical impairment. *See, e.g., Halstead Industries v. Jones*, 603 S.W.2d 456 (Ark.1980) (permanent total disability awarded with fifteen percent physical impairment); and *Employers Mutual Liability Insurance Co. of Wisconsin v. Industrial Commission*, 25 Ariz.App. 117, 541 P.2d 580 (1975) (physical functional disability of fifteen percent).

The odd-lot doctrine further requires an evaluation of disability in terms of the specific individual who has suffered a work-related injury. For example, in *Northwest Carriers, Inc. v. Industrial Commission of Utah, supra*, we endorsed the doctrine and articulated specific concerns which must be considered in evaluating an individual's disability. We there stated:

> *Factors extrinsic to an industrial injury, such as age, mental abilities, prior training, and job market, are appropriate factors in determining an injured employee's earning power and degree of disability....* [T]his Court has previously relied on one or more of these factors in determining the degree of disability.

Id. at 141 (citations omitted; emphasis added). In *Northwest Carriers*, the Commission found that both workers were permanently and totally disabled because of factors which comprised the odd-lot doctrine. Those employees, although not totally incapable of performing some work, were not capable of adapting to a new employment situation. This inability to adapt may be exacerbated by lack of mental capacity and education. In his treatise, Professor Larson defines an employee in the odd-lot category as one "who is so injured that he can perform no services other than those which are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist." 2 A. Larson, *Workmen's Compensation Law* § 57.51, at 10–164.22 (1975) (citation omitted).

In *Northwest Carriers*, we applied the odd-lot doctrine and found that the advanced age of the employees, their lack of formal education, and their limited training and skills, *in addition* to the physical impairment, were all factors contributing to their disability. More recently, we applied it in *Marshall v. Industrial Commission*, 681 P.2d 208 (Utah 1984).[3] There, Nolan Marshall was denied permanent total disability benefits after a work-related accident. He was sixty-seven years old, had worked forty years at heavy labor in the mines, and had less than a high school education. Marshall was a likely candidate for the odd-lot category.

With regard to total disability claims, we noted in *Marshall:*

> Disability is evaluated not in the abstract, but in terms of the specific individual who has suffered a work-related injury. An injury to a hand would not cause the same degree of disability in a teacher for example as it would in an

3. On remand, plaintiff was awarded permanent total disability benefits and appealed seeking interest on the award for past due benefits. *See Marshall v. Industrial Commission*, 704 P.2d 581 (Utah 1985).

electrician. Thus, in assessing the lack of learning capacity, a constellation of factors must be considered, only one of which is the physical impairment. Other factors are age, education, training and mental capacity. *See Northwest Carriers v. Industrial Commission, supra,* at 141; *Morrison-Knudsen Construction Co. v. Industrial Commission,* 18 Utah 2d 390, 424 P.2d 138 (1967). It is the unique configuration of these factors that together will determine the impact of the impairment on the individual's earning capacity.

Id. at 211.

We also stated that:

[O]nce the employee has presented evidence that he can no longer perform the duties required in his occupation, and that he cannot be rehabilitated, the burden shifts to the employer to prove the existence of regular, steady work that the employee can perform, taking into account the employee's education, mental capacity and age.

Id. at 212 (citation omitted).

[2, 3] By that three-step process, we did not mean that the employee must prove on his own that he is unable to be rehabilitated. Such a requirement would place the employee in the untenable position of assessing his own potential for rehabilitation. In order for an accurate assessment of his rehabilitation potential to be made, section 35–1–67 requires the Commission to draw upon the expertise of the Division of Vocational Rehabilitation. Once the employee has been referred there upon the Commission's tentative finding of permanent total disability, the burden is then on the employee through his cooperation with the Division to establish that he cannot be rehabilitated. If that is done, the Division then certifies to the Commission that it has received the employee's full cooperation in its efforts to rehabilitate him, and that in its opinion, he cannot be rehabilitated. It is at this time that the burden shifts to the employer to prove the "existence of regular, steady work that the employee can perform," taking into account the plaintiff's education, mental capacity, and age. *Marshall, supra,* at 212. *See also Lyons v. Industrial Special Indemnity Fund,* 98 Idaho 403, 565 P.2d 1360 (1977); *Employers Mutual Life Insurance Co. v. Industrial Commission, supra; Hill v. U.S. Plywood-Champion Co.,* 12 Or.App. 1, 503 P.2d 728 (1972); *Brown v. Safeway Stores, Inc.,* 82 N.M. 424, 483 P.2d 305 (1970); *Transport Indemnity Co. v. Industrial Accident Commission,* 157 Cal.App.2d 542, 321 P.2d 21 (1958); 2 A. Larson, *The Law of Workmen's Compensation* § 57.51 (1976). Despite the City's contentions that it offered various jobs to plaintiff, the record is devoid of any concrete evidence that he was offered work of the general nature he had been performing.

[4] The administrative law judge's substitution of his judgment for the evaluation of the Division of Vocational Rehabilitation was clearly error. Despite the findings of the medical panel and despite his own findings that plaintiff suffered from "continuous headaches, dizziness, [feeling] sick, and occasionally [passing] out," all symptoms that would diminish one's ability to perform most any work, he still recommended that plaintiff look for "jobs such as service station attendant [or] motel manager." It is not enough in such a case to allege that work is available; it must be shown that there is regular, dependable work available for the plaintiff, without the expectation that he will rely on the sympathy of friends or his own "superhuman efforts." *Marshall v. Industrial Commission,* 681 P.2d at 212. This work must be such that he can perform it or be trained to so do. *See, e.g., Lyons v. Industrial Special Indemnity Fund, supra.*

At almost the age of sixty, with a limited education and an even more limited work background, plaintiff is not likely to enter a new area of the work force. Absent proof of employment reasonably available to one in the odd-lot category, the injured employee should be classified as totally disabled. *Employers Mutual Liability Insurance Co. v. Industrial Commission,* 541 P.2d at 583.

[5] Therefore, we hold that plaintiff presented a prima facie case of tentative permanent total disability to the Commission. We remand the case to the Commission for additional proceedings consistent with this opinion, including (1) referral to the Division of Vocational Rehabilitation for a determination of whether plaintiff can be rehabilitated, and (2) the taking of further medical evidence relating to plaintiff's heart condition and the extent to which it may affect his disability, as well as any other medical evidence deemed necessary by the Commission to update plaintiff's condition.

HALL, C.J., and STEWART, DURHAM and ZIMMERMAN, JJ., concur.

In the Matter of the ESTATE OF Rolando S. GARZA, Deceased.

No. 19360.

Supreme Court of Utah.

Sept. 11, 1986.

Guardian brought suit on behalf of children for alleged wrongful death of their mother. The Third District Court, Salt Lake County, Timothy R. Hanson, J., entered judgment for children, and administrator of father's estate appealed. The Supreme Court, Howe, J., held that: (1) minors' claims against estate of their father did not have to be brought within three years of father's death, and (2) punitive damages claim did not survive death of father.

Modified and affirmed as modified.

1. Death ⇐39

Two-year statute of limitations applicable to claim for wrongful death began to run at time of death. U.C.A.1953, 78–12–28(2).

2. Death ⇐39

Two-year statute of limitations applicable to minors' wrongful death claims was tolled during their minority. U.C.A.1953, 78–12–28(2), 78–12–36(1).

3. Death ⇐39

Minors' claims against estate of their father, for alleged wrongful death of their mother, did not have to be presented within three years after father's death, where administrator of his estate published notice to creditors and claims were filed within three months of first publication. U.C.A.1953, 75–3–803(1)(a, b).

4. Executors and Administrators ⇐211

Punitive damages claims do not survive death of tort-feasor and cannot be sought from tort-feasor's estate.

Cecelia M. Espenoza, John L. Black, Jr., Salt Lake City, for appellant.

Robert J. Poulsen, Murray, for respondent.

HOWE, Justice.

This matter arises in the aftermath of a murder-suicide. Rolando Garza shot and killed Diane, his wife of three years, on June 28, 1978. He then took his own life, leaving the couple's two minor children orphaned. Cleo Garcia, Diane's mother and maternal grandmother of the two children, was appointed their guardian.

On June 18, 1981, almost three years after Rolando's death, Roman Garza, Rolando's father, was appointed personal representative of his estate. He collected the assets of the estate, consisting of $12,392.90 in life insurance proceeds, and published notice to creditors on December 4, 1981.

Cleo Garcia presented a claim against the estate on March 2, 1982, which was two days before the end of the three-month period allowed for the presentment of

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than that encountered in non-employment life and are therefore legally sufficient. The medical causation test is likewise satisfied by the medical panel's finding that "the work activities as described over a three-day period could produce a lumbar sprain aggravating the preexisting problem he had had." No more is needed to hold that Miera suffered a compensable industrial accident.

The case is remanded for a medical evaluation of Miera's industrial injury in proportion to his previous disability and a commensurate apportionment of benefit payments between the Second Injury Fund and the State Insurance Fund. Costs are awarded to Miera.

HALL, C.J., and DURHAM and ZIMMERMAN, JJ., concur.

STEWART, J., concurs in the result.

Bruce D. NORTON, Plaintiff,

v.

The INDUSTRIAL COMMISSION OF the STATE OF UTAH, United States Steel Corporation, [Self-insured Employer], and the Second Injury Fund of the State of Utah, Defendants.

No. 21017.

Supreme Court of Utah.

Nov. 25, 1986.

In petition for review, worker challenged decision of Industrial Commission denying his claim for permanent total disability. The Supreme Court held that finding that worker was not permanently totally disabled was not supported by sufficient evidence where Industrial Commission failed to consider worker's vocational history, educational limitations, learning disability, and age, in concert with his multiple disabling condition and need for total reeducation.

Reversed and remanded.

1. Workers' Compensation ⇐1639

Finding that worker was not permanently totally disabled was not supported by sufficient evidence where Industrial Commission failed to consider worker's vocational history, educational limitations, learning disability, and age, in concert with his multiple disabling conditions and need for total reeducation.

2. Workers' Compensation ⇐847

Fact that worker continued work for six years after accident, standing alone, did not foreclose worker's claim that he was permanently totally disabled where worker spent those six years in considerable pain.

3. Workers' Compensation ⇐847

Relevant factors in determining whether worker who returned to work after accident is permanently totally disabled include probable dependability with which injured worker can sell his services in competitive labor market, probability of future impairment of future earning capacity as indicated by nature of injury, age of worker, and other relevant factors.

4. Workers' Compensation ⇐1377

Only where employee returns to work after accident under normal conditions will presumption of no loss of earning capacity stay unassailed.

Virginius Dabney, Salt Lake City, for plaintiff.

David L. Wilkinson, Atty. Gen., Salt Lake City, for Indus. Com'n.

Erie V. Boorman, Salt Lake City, for Second Injury.

Phil N. Walker, San Francisco, Cal., for U.S. Steel.

PER CURIAM:

In this petition for review, petitioner Bruce D. Norton challenges the decision of the Industrial Commission denying his claim for permanent total disability. Norton contends that the Commission erroneously based its findings on medical impairment alone without examining his earning capacity, ignored his total disability under the "odd-lot" doctrine, and ruled contrary to the evidence produced by him in support of his claim. None of the defendant parties has filed a response. We reverse and remand for a hearing consistent with this opinion.

Norton was employed as a coal miner of United States Steel in East Carbon, Utah, for thirty-nine years of his life. He was sixteen years old when he began working full-time in 1943 and fifty-six when he stopped working in 1983. He earned a living throughout those years by dint of his brawn, performing arduous physical labor that required little, if any, skills. Norton's literacy is marginal at best.

On August 10, 1977, Norton sustained an injury to his neck and shoulder when a pulley malfunctioned and sent a heavy cable crashing down on his neck with such force that his face was embedded in the coal and he had to be pried out from under the cable by his companions. Initial diagnosis was contusion over base of neck, no fracture. Norton returned to work after one week wearing a soft collar. Because of persistent pain, he was given a myelogram in December which showed a herniated disc at C5–C6 interspace and right shoulder traumatic bursitis. Moderate irritation of the right C6–C7 nerve roots was found as well. Traction and heat were prescribed as conservative treatment, with a possibility of surgery indicated. Norton continued to suffer persistent headaches and neck pain which have worsened with time, apparently symptoms of residual spondylosis and spurring. His company physician advised him that the day would come when he would want to have surgery. Norton was reluctant to take that step and informed his supervisor that inasmuch as he had elected not to have surgery, he should also take himself off compensation and return to work.

Throughout his remaining working years, Norton intermittently underwent traction and physical therapy, wore a back brace, and took pain medication. During the last eighteen months of his work his legs felt numb whenever he turned slightly, and at one point he experienced a fifteen to twenty minute paralysis of his left lower extremity. His left-hand grip and strength of the left arm continued to decrease to a point where he would drop objects and frequently lose feelings in his fingers at night. Nonetheless, he worked until March of 1983 when he took a medical retirement.

Norton's prior injuries included a broken back when he was thirteen years old, resulting in lumbar spine degenerative joint disease, right ankle traumatic arthritis stemming from a broken ankle, bilateral inguinal hernia for which he has been in surgery three times, hyperacidity with history of duodenal ulcer and focal skin cancers. Impairments developed after the industrial injury include tendovaginitis of the right little finger, pulmonary allergic bronchitis, and hypertensive cardiovascular disease with cardiomyopathy aggravated by life-long obesity.

Norton was pronounced ineligible for rehabilitation by the Division of Vocational Rehabilitation before the Commission rendered its final decision.

Basing his findings of facts and conclusions of law partially upon the report of a medical panel, and partially upon the report of Norton's own physicians, the administrative law judge found a 14% whole man impairment attributable to pre-existing conditions, a 10% uncombined permanent physical impairment as a result of the industrial accident, raising the overall impairment to 23% of the whole man, and a 31% impairment as a result of all causes that developed subsequent to the industrial accident.[1]

1. Norton's challenge to the percentages found by the medical panel and adopted by the admin-

The administrative law judge then concluded that this impairment construed in a light most favorable to Norton did not require a finding of permanent total disability The administrative law judge noted the impairments that followed the industrial accident, stressed the fact that Norton continued to work for six more years after the accident, concluded that the evidence clearly did not warrant a determination that Norton was permanently and totally disabled as a consequence of his industrial accident and therefore denied that claim Nowhere in the findings, conclusions and order, or in the affirmance of that order by the Board of Review is there any mention about Norton's eligibility for rehabilitation No findings were made on Norton's earning capacity in his field of endeavor or elsewhere It is this lack of findings that mandates a reversal and remand for further proceedings

Under our well-settled standard of review, we are limited to determining whether the Commission's findings are supported by substantial evidence *Hardman v Salt Lake City Fleet Management*, Utah, 725 P 2d 1323 (1986) (citations omitted) But where the findings of fact do not support the award, this Court may set aside the Commission's award U C A , 1953, § 35–1–84(2)

[1] As in *Hardman, supra*, where it confused the percentage of impairment, a medical finding, with the percentage of disability, an administrative evaluation of earning capacity, the Commission again failed in this case to carry out its task It adopted with slight modification the findings of *impairment* reported by the medical panel but then failed in its administrative responsibility and function to evaluate Norton's permanent *disability* which should have included such factors as Norton's "present and future ability to engage in gainful activity as it is affected by such diverse factors as age, sex, education, economic and social environment, in addition to the definite medical factor—permanent impairment" [2] As this Court has stated in *Marshall v Industrial Commission*, 681 P 2d 208, 211 (Utah 1984)

> This ability is evaluated not in the abstract, but in terms of the specific individual who has suffered a work related injury [I]n assessing the lack of earning capacity, a constellation of factors must be considered, only one of which is the physical impairment Other factors are age, education, training and mental capacities [Citations omitted] It is the unique configuration of these factors that together will determine the impact of the impairment on the individual's earning capacity

Accord Hardman at 1326–1327 No mention is made of those other factors here, in spite of the fact that the Commission had before it the evaluation of the Division of Vocational Rehabilitation that spells out Norton's vocational history, educational limitations, learning disability and age "in concert with his multiple disabling conditions and a need for total re-education" That evaluation presents prima facie evidence that Norton, while not altogether incapacitated for work, is so handicapped that he will not be employed regularly in any well-known branch of the labor market, *Marshall* at 212, and therefore falls into the so-called "odd-lot" category *Hardman* at 1327

[2–4] With respect to the administrative law judge's finding that Norton's continued work for six years was proof that he was not permanently totally disabled in 1983, it should be pointed out that that fact standing alone does not foreclose Norton's claim The administrative law judge correctly considered Norton's return to work as one factor to be weighed in determining his disability He erred when he failed to con

istrative law judge must be rejected The rating is proper under the formula explained in *Second Injury Fund v Perry's Mill and Cabinet Shop* 684 P 2d 1269 (Utah 1984) and *Jacobsen Construction v Hair* 667 P 2d 25 (Utah 1983)

2 See the Commission's own explanation of the difference between impairment and disability in *Northwest Carriers Inc v Industrial Commission*, 639 P 2d 138 140 n 3 (Utah 1981)

sider the *condition* under which Norton continued his employment, as manifested by his finding "the very fact that the applicant continued to work in underground mining for six years following his accident is convincing evidence that his accident did not render him permanently and totally disabled." Norton's decision to return to work did not automatically disqualify him from receiving permanent total disability benefits, where the facts indicate that throughout the remainder of his employ he was not restored to health. The evidence is undisputed that Norton spent the last six of his working years in considerable pain. Provided that a worker's disability was also analyzed within the framework of the odd-lot doctrine, case law dealing with the factor of substantial pain has generally held that "[a] worker who cannot return to any gainful employment without suffering substantial pain is entitled to compensation benefits for total disability." *Comea v. Cameron Offshore Services, Inc.*, 420 So.2d 1209 (La.App.1982).

> The presence of substantial pain may logically cause an injured worker to fall into this odd-lot category, inasmuch as it directly affects the probable dependability with which the injured worker can sell his services in a competitive labor market, undistorted by such factors as business booms, sympathy of a particular employer or friends, temporary luck, or the superhuman efforts of the claimant to rise above his crippling handicaps.

Calogero v. City of New Orleans, 397 So.2d 1252, 1254 (La.1980), modified 434 So.2d 177 (La.App.1983) (benefits affirmed on substantial pain theory alone), *citing* L.A. Larson, *The Law of Workman's Compensation* § 10–164.49 (1980). The probability of future impairment of future earning capacity as indicated by the nature of the injury, the age of the worker, and other relevant factors must likewise be assessed. *Island Creek Coal Co. v. Taylor*, 468 S.W.2d 318 (Ky.1971). *See also Harwell v. Argonaut Insurance Co.*, 296 Or. 505, 678 P.2d 1202 (1984); *Tsuchiyama v. Kahului Trucking and Storage, Inc.*, 2 Hawaii App. 659, 638 P.2d 1381 (1982); *Smith v. Industrial Commission*, 113 Ariz. 304, 552 P.2d 1198 (1976). Only where the employee returns to work under normal conditions will the presumption of no loss of earning capacity stay unassailed. *Midland-Ross Corp. v. Industrial Commission*, 107 Ariz. 311, 486 P.2d 793 (1971).

> It may be years before the effect is felt. But a man with a stiffened arm or damaged back or badly weakened eye will presumably have a harder time doing his work well and meeting the competition of young and healthy men. When a man stands before the worker's compensation court with proven permanent physical injuries, for which the exclusive remedy has abolished all possibility of common law damages, it is not justifiable to tell him he has undergone no impairment of earning capacity, solely on the strength of current paychecks.

Cleveland v. Cyprus Industrial Minerals, 196 Mont. 15, 636 P.2d 1386 (1981), *citing Fermo v. Superline Products*, 175 Mont. 345, 574 P.2d 251 (1978). It need not be restated at great length that the Workmen's Compensation Act is to be liberally construed and that any doubt with respect to the right of compensation will be resolved in favor of the injured employee. *State Tax Commission v. Industrial Commission*, 685 P.2d 1051 (Utah 1984); *McPhie v. Industrial Commission*, 567 P.2d 153 (Utah 1977).

'Upon remand the Commission is required to address Norton's *disability* in light of all factors mentioned *ante*, and the burden will be on the employer to prove the existence of regular, steady work that Norton could perform, taking into account his age, limited education, and functional illiteracy, as well as his disabling pain. Contrary to the Commission's disclaimer noted in *Northwest Carriers* at 140, n. 3, permanent *impairment* alone is never the sole or real criterion of permanent *disability*, and a denial of permanent total disability based on it alone invites reversal under well-settled stare decisis.

The matter is remanded for further proceedings consistent with this opinion.

PECK V. EIMCO PROCESS EQUIPMENT

hearing or at the trial outside the presence of the jury, that there is a continuing objection to the evidence challenged in the motion to suppress.

Howe, Justice, and Zimmerman, Justice, concur in the concurring opinion of Justice Durham.

Cite as
73 Utah Adv. Rep. 26

IN THE SUPREME COURT OF THE STATE OF UTAH

Alma E. PECK,
Plaintiff,
v.
EIMCO PROCESS EQUIPMENT CO., Second Injury Fund and Industrial Commission of Utah,
Defendants.

No. 20914
FILED: December 31, 1987

Original Proceeding in this Court

ATTORNEYS:

Roger D. Sandack, Salt Lake City, for Peck

Robert R. Finch, Salt Lake City, for Eimco

Erie Boorman, Salt Lake City, for Second Injury Fund

David L. Wilkinson, Ralph L. Finlayson, Salt Lake City, for Industrial Commission

STEWART, Associate Chief Justice:

This is an action by plaintiff Alma E. Peck challenging an Industrial Commission order denying him permanent total disability benefits. We reverse and remand.

While employed by Eimco Processing Equipment Company as an industrial maintenance mechanic, Peck suffered two compensable industrial injuries which resulted in permanent physical impairment. The first injury, on September 12, 1980, required surgery on Peck's right knee and caused a two percent impairment of the body. The second injury, on December 29, 1982, necessitated surgery on Peck's lower back and resulted in a ten percent loss of body function. Peck was then sixty-three years old.

Although Peck's last injury occurred in December, 1982, he continued to work until March 7, 1983, when his doctor prescribed surgery. On March 17, back surgery was performed. On June 27, 1983, Peck returned to work under light-duty restrictions. Peck applied to the Commission for temporary total disability benefits from March 7 to June 27 and for permanent partial disability benefits thereafter, claiming that the surgery on his back failed to restore his ability to return to his normal work. The Commission set a hearing for October 17, 1983.

After the hearing, the administrative law judge appointed a medical panel to evaluate Peck's case. The medical panel concluded that Peck suffered a twenty-four percent preexisting physical impairment and that the industrial injuries combined with the preexisting impairments to produce a thirty-three percent permanent physical impairment.

On April 27, 1984, Peck turned sixty-five years old. The next day, April 28, ten months after returning to work following the back surgery, Peck retired. Peck then requested a determination regarding permanent total disability from the Commission. A second hearing was set for September 25, 1984. After the second hearing, the Commission sent Peck to the Division of Rehabilitation Services to determine whether he could be rehabilitated for other employment. The rehabilitation officer concluded that due to his age and physical impairments, Peck was not a good candidate for rehabilitation.

On February 28, 1985, the administrative law judge issued his findings of fact and conclusions of law. Among his findings, the judge stated:

> The Applicant worked effectively before the December 1982 injury despite his 27% pre-existing impairment .... The December 1982 incident only added a 10% impairment. The Applicant was able to work effectively in his job for about a year after his injuries healed. There is no evidence of new injury, nor is there any medical evidence that the Applicant was taken off the job April 28, 1984, because of his old injuries. The Applicant just plain retired.

The judge ruled, however, that Peck was entitled to temporary total disability benefits for the period from March 7 to June 27 and, "[w]ith great reluctance," that Peck was permanently and totally disabled under existing Utah case law and entitled to benefits accordingly.

Defendant Second Injury Fund appealed to the Commission to reverse the award of permanent total disability benefits. Although the Commission upheld the award of temporary total disability benefits, it reversed the award of permanent total disability benefits. The Commission based its reversal on the judge's findings that Peck "did not leave work on April 27, 1984 because of old or new injuries" and that Peck "just plain retired." The Commission concluded that Peck failed to meet "his burden in showing an inability to return to work," as required by Utah Code Ann.

§35-1-67 (Supp. 1987).

Peck seeks review of the Commission's order denying permanent total disability benefits. The issues raised are (1) whether Peck is entitled, due to his industrial injuries, to permanent total disability benefits under the odd-lot doctrine pursuant to Utah Code Ann. §35-1-67, and (2) whether there is evidentiary support for the findings of fact made by the administrative law judge and adopted by the Commission that Peck was "able to work effectively in his job for about a year after his injuries healed" and that he "just plain retired."

I.

The ultimate issue presented by this case is whether Peck is entitled to permanent total disability benefits provided by Utah Code Ann. §35-1-67 under the odd-lot doctrine enunciated in *Marshall v. Industrial Comm'n*, 681 P.2d 208 (Utah 1984).

In *Marshall*, the Court stated, "Under the odd-lot doctrine, ... total disability may be found in the case of workers who, while not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well-known branch of the labor market." 681 P.2d at 212 (quoting 2 Larson, *The Law of Workmen's Compensation* §57.51, at 10-164.24 (1983)). The Court further stated:

> [A] workman may be found totally disabled if by reason of the disability resulting from his injury he cannot perform work of the general character he was performing when injured, or any other work which a man of his capabilities may be able to do or to learn to do ...

Id. at 211 (quoting *United Park City Mines Co. v. Prescott*, 15 Utah 2d 410, 412, 393 P.2d 800, 801-02 (1964)) (emphasis omitted). The Court further stated that the term "disability" means the loss of wage-earning capacity and that a disability must be assessed in terms of the specific individual who has suffered a work-related injury, taking into account such factors as age, education, training, and mental capacity. "It is the unique configuration of these factors that together will determine the impact of the impairment on the individual's earning capacity." *Id.* at 211. *See also Norton v. Industrial Comm'n*, 728 P.2d 1025, 1027 (Utah 1986); *Hardman v. Salt Lake City Fleet Management*, 725 P.2d 1323, 1326-27 (Utah 1986). Furthermore, Professor Larson states:

> "Total disability" in compensation law is not to be interpreted literally as utter and abject helplessness. Evidence that claimant has been able to earn occasional wages or perform certain kinds of gainful work does not necessarily rule out a finding of total disability nor require that it be reduced to partial ....
>
> ... The essence of the test is the probable dependability with which claimant can sell his services in a competitive labor market, undistorted by such factors as business booms, sympathy of a particular employer or friends, temporary good luck, or the superhuman efforts of the claimant to rise above his crippling handicaps.

2 Larson, *The Law of Workmen's Compensation* §57.51(a), at 10-164.65, 10-164.84(18) (1987) (footnotes omitted).

We enunciated in *Marshall* the procedure for an employee to prove that he is entitled to permanent total disability benefits under the odd-lot doctrine. The employee must first present a prima facie case that no regular, dependable work is available to him. To do this, the employee must present "evidence that he can no longer perform the duties required in his occupation and that he cannot be rehabilitated" to perform some other type of employment. *Marshall*, 681 P.2d at 212. Once the employee has presented a prima facie case, "the burden shifts to the employer to prove the existence of regular, steady work that the employee can perform, taking into account the employee's education [work experience], mental capacity and age." *Id.* Failure by the employer to meet its burden of proof entitles the employee to permanent total disability benefits.

Peck argues that he presented a prima facie case of permanent total disability under the odd-lot doctrine by proving that he was sixty-three years old at the time of his last industrial accident, had no formal education beyond high school, worked his entire life in heavy manual labor, was no longer capable of performing the duties of his job, and could not be rehabilitated. The administrative law judge, however, found that Peck "was able to work effectively in his job for about a year after his injuries healed" and that Peck "just plain retired" the day after he turned sixty-five years old.

In reviewing the evidentiary basis for findings of fact made by the Industrial Commission, this Court inquires only whether the Commission's findings are supported by substantial evidence. *Bigfoot's Inc. v. Industrial Comm'n*, 714 P.2d 1152, 1153 (Utah 1986). On a thorough review of the record, we conclude that the findings of fact made by the administrative law judge and adopted by the Commission are unsupported by the evidence and must be set aside.

The record contains evidence introduced primarily in two hearings, including letters

knee are a continuing problem" and that he "is not a good candidate for Rehabilitation."

Nowhere in the record did Eimco ever contradict either Peck's testimony or that of his fellow employees that he was unable to perform his job. Nor did Eimco present any evidence or testimony that Peck could, and did, adequately perform his job or the duties of any other job generally available. Eimco attempts to support the Commission's finding that Peck worked effectively in his job following his injuries by citing that portion of the record wherein Peck was asked if he had ever "had to turn down any jobs that had been assigned to" him and Peck answered that he had not.

However, a proper reading of the context of Peck's answer quickly dispels any notion that it supports the Commission's finding. Peck was asked, "[A]re you able to perform the jobs assigned to you?" He responded, "[J]ust with help." Eimco's attorney then rephrased the question and asked, "[H]ave you had to turn down any jobs?" Peck replied that he had not accepted any. At that point, the judge intervened:

> THE COURT: You haven't been assigned any jobs or you haven't - -
>
> THE WITNESS: Any jobs that weren't very minor jobs. The jobs I have worked on, others have been with me and taken the brunt of it and I have been more a helper than anything else and that's about all I have been, is a helper.
>
> THE COURT: The question was, have you had to turn down any jobs that have been assigned to you.
>
> THE WITNESS: No.

In this context, Peck's response that he had not turned down any jobs that had been assigned to him does not support a conclusion that he was capable of performing the tasks required in his job. On the contrary, Peck not only explained that he was unable to perform his normal duties, but also that Eimco had not assigned him the types of jobs he had performed prior to his injury.

Next, Eimco argues that Peck's return to work following his last injury supports the judge's findings. Evidently, the fact that Peck returned to work and continued to work until he retired at age sixty-five was a principal factor in the Commission's denial of permanent total disability benefits. The Commission stated:

> In the *Marshall* case, the Applicant was unable to return to work after his industrial accident. Here, [Peck] was obviously able to return to work because in fact he did. [Peck] worked for nearly one full year after his final industrial accident, and retired on the day after he turned sixty-five years old. The facts in this case do not show that [Peck] has met his burden of proof in showing inability to return to work as is required by [Utah Code Ann. §35-1-67].

Although the fact that an employee returns to work following an industrial injury may be relevant in determining the employee's ability to perform the duties of his occupation and thus may be a factor in assessing whether the employee has suffered any loss of earning capacity, that fact alone is not conclusive of his ability to work, nor is it dispositive of the issue of his earning capacity. We have recently held that "[o]nly where the employee returns to work under normal conditions will the presumption of no loss of earning capacity stay unassailed." *Norton v. Industrial Comm'n,* 728 P.2d at 1028.

In *Norton,* we held that the fact that the claimant returned to work and continued to work for six years following his industrial accident "did not automatically disqualify him from receiving permanent total disability benefits, where the facts indicate[d] that throughout the remainder of his employment he was not restored to health." *Id.* Other jurisdictions have also awarded permanent total disability benefits even though the claimant returned to work following the industrial injury. *See Roberts v. WPBT,* 395 So. 2d 233, 234 (Fla. Dist. Ct. App. 1981); *Liberty Mut. Ins. Co. v. Archer,* 108 Ga. App. 563, 564, 134 S.E.2d 204, 205 (1963); *Schober v. Mountain Bell Tel.,* 96 N.M. 376, ____, 630 P.2d 1231, 1236 (N.M. Ct. App. 1980); *Harmon v. SAIF,* 71 Or. App. 724, ____, 693 P.2d 1366, 1368 (1985); *Texas Employer's Ins. Ass'n v. Armstrong,* 572 S.W.2d 565, 566 (Tex. Civ. App. 1978). See also Allen v. Fireman's Fund *Ins. Co.,* 71 Or. App. 40, ____, 691 P.2d 137, 140 (1984). *But see Special Indem. Fund v. Stockton,* 653 P.2d 194, 196 (Okla. 1982). At most, the fact that an employee returns to work after an industrial injury creates a "rebuttable presumption that the claimant has not sustained permanent and total disability." *Special Indem. Fund v. Stockton,* 653 P.2d at 198.

In this case, Peck presented uncontroverted evidence not only of his physical impairment, but also of his inability to perform his job, including evidence that he was in continual pain and that his fellow employees did much of his work for him. Eimco did not controvert Peck's evidence, and as the record stands, Peck clearly rebutted any presumption that he was able to work effectively following his injuries.

Eimco next contends that the judge's

from physicians, a medical panel's report, and an evaluation of Peck by the Division of Rehabilitation Services. The record is replete with evidence that Peck was unable to perform the normal duties of his occupation, that he required the aid of his fellow employees who performed the bulk of his work for him, and that he suffered continual pain as a result of his industrial injuries.

For example, in the first hearing, on October 17, 1983, four months after returning to work following his back surgery, Peck testified that he could no longer perform the duties of his job. He testified that his doctor told him to "be careful, move slow and not lift any more than I have to" and that he "hoped my co-workers would take the brunt of the load and help me so that I could carry on." He also testified that he was unable to lift anything or bend over because of pain in his legs and back and that after working a few days, his leg would go numb. Peck's own testimony was supported in the record by two letters written to Eimco by Peck's doctor. In the first letter, dated one week before Peck returned to work June 27, 1983, the doctor advised Eimco that Peck would require light-duty work and good care in the exercise of his duties. The doctor also stated, "Cooperation from his supervisors and co-workers would be helpful to [Peck]." In the second letter, dated one month after Peck returned to work, the doctor notified Eimco that Peck was "concerned about his ability to perform [the] heavy work assigned to him" because of his impairments. The doctor stated that Peck was "trying to do his work and I believe is conscientiously pursuing this goal," but "[w]hether or not he will continue to be able to carry out the duties assigned to him we will simply have to wait and see."

In addition to Peck's testimony, three of his fellow employees were present at the hearing and, upon agreement of the parties, proffered their testimony through Peck's attorney. According to the proffered testimony, one of the witnesses "would testify as to [Peck's] limitations from and after [his back injury and] how people have had to help him, [and] the fact that he has really been getting along with their help."

At the second hearing, on September 25, 1984, five months after Peck retired from Eimco, Peck again testified that he could not adequately perform his work. When asked what kind of job activities he did upon returning to work, Peck answered:

> Well, I was still in maintenance, but I wasn't able to do my work. I couldn't have stayed there, but the guys I worked with were kind enough to take the buffer and make it possible for me to hang on.
>
> ....
>
> They did all the lifting. If I had required any extra lifting or anything, they helped me with it because I couldn't do it.

When asked to specify the work constituting his normal duties that he could no longer perform, Peck stated:

> Well, in lifting, a lot of that machinery you have to work it into place. You take a big gearbox out, you have to let it down, and you have to manhandle it, or you take out gears and they're hard to lift .... I couldn't do the work that I had done all the years I'd been there.

When asked his reasons for retiring, Peck responded that one day he and a fellow employee were moving a big gearbox, trying to get it into place, when "[m]y back gave out on me, my legs went, I fell down, I hit my head ... and if someone had been depending on me supporting my share of it ... somebody could have been hurt very bad." He also testified that another reason he retired was that his department had just undergone a reorganization which split-up the crew he had been working with and would require that each employee do more jobs by himself and that he just could not do the work.

At the second hearing, Dr. Holbrook, who headed the medical panel, testified. When Peck's attorney asked Dr. Holbrook his opinion of whether Peck was physically capable of doing his work at Eimco, he replied:

> I think it's a reasonable assumption that he might or might not ... you just about have to follow him around all day for a lot of days. But, if Mr. Peck says he can't do it, I believe that would be a reasonable assumption to make, based upon all the various impairments that he has.

Additional evidence supports Peck's claims that he was unable to adequately perform his job following his injuries. The medical panel's report, issued prior to the second hearing, states that Peck's knees are "aggravated by his work activities because of the weakness of his back throwing more stress on his knees when he lifts" and that his right knee "does occasionally pop," but that mostly there "is a deep ache that becomes very sore with a lot of activities." Referring to Peck's back, the report states, "He does still get some numbness and tingling in the right lower extremity particularly with lifting ...." The report also states that Peck "has returned to work but is working more as a helper." In further support of Peck's claims, the Rehabilitation Services evaluation of Peck states that his "back and

finding that Peck "just plain retired" the day after he turned sixty-five years old supports the Commission's denial of permanent total disability benefits.[1] In *Marshall,* however, we held that the determination whether to award permanent total disability benefits must focus on the decline in claimant's wage-earning capacity and not on the claimant's eligibility to retire. 681 P.2d at 213. The mere fact that an employee has retired will not adversely affect a determination of permanent total disability when the employee has demonstrated that his disability from the industrial injury significantly influenced his decision to retire. *See Arizona Pub. Serv. Co. v. Industrial Comm'n,* 145 Ariz. 117, 119, 700 P.2d 504, 506 (Ariz. Ct. App. 1985); *Liberty Mut. Ins. Co. v. Archer,* 108 Ga. App. 563, 564, 134 S.E.2d 204, 205 (1963); *Molyneux v. New York Tel. Co.,* 101 A.D.2d 903, ____, 475 N.Y.S.2d 599, 600 (N.Y. App. Div. 1984); *Bahor v. New York Tel. Co.,* 91 A.D.2d 756, ____, 458 N.Y.S.2d 24, 25 (N.Y. App. Div. 1982); *Robinson v. New York Tel. Co.,* 86 A.D.2d 916, ____, 448 N.Y.S.2d 252, 253 (N.Y. App. Div. 1982); *Wheeling-Pittsburgh Steel Corp. v. Workmen's Compensation Appeal Bd.,* 452 A.2d 611, 613 (Pa. Commw. Ct. 1982). *See also Tsuchiyama v. Kahului Trucking and Storage,* 638 P.2d 1381, 1382 (Haw. Ct. App. 1982).

Only when a finding is made and supported by evidence that the employee's retirement is not substantially motivated by his industrial injury, but is due primarily to personal or other reasons, will a denial of disability benefits be upheld on the basis of voluntary retirement. *See Saenger v. Liberty Carton Co.,* 281 N.W.2d 693, 695 (Minn. 1979); *Cameron v. Carrier Air Conditioning Co.,* 85 A.D.2d 864, ____, 446 N.Y.S.2d 499 (N.Y. App. Div. 1981); *Osowski v. Board of Coop. Educ. Serv.,* 78 A.D.2d 740, ____, 432 N.Y.S.2d 729, 730 (N.Y. App. Div. 1980).

Since none of the defendants has produced evidence that Peck was able to perform his job adequately or that his retirement was not substantially related to his industrial injury, we must conclude that the Commission's findings are wholly unsupported by the evidence.

We find that Peck presented a prima facie case entitling him to permanent total disability benefits under the odd-lot doctrine, as set forth in *Marshall.* The following language from *Marshall* controls this case:

> He presented uncontroverted evidence of his impairment, his inability to perform the work required by his job and the opinion of the division of vocational rehabilitation that he could not be rehabilitated. He also testified that prior to his injury he had fully intended to work rather than to retire.

681 P.2d at 213.

On this showing, the burden shifted to Eimco to demonstrate the availability of regular work which Peck could perform to indicate whether he had any reasonable wage-earning capacity. Eimco relied only on the facts that Peck returned to work following his injury and then retired ten months later. Thus, Eimco failed to show any reasonable wage-earning capacity which rebutted Peck's prima facie entitlement to permanent total disability benefits.

II.

This Court may set aside the Commission's award if unsupported by the findings of fact. Utah Code Ann. §35-1-84(2) (1974). In this case, the administrative law judge adopted the findings of the medical panel that Peck's total physical impairment was thirty-three percent. However, neither the judge nor the Commission in its review of the judge's decision made any separate assessment of Peck's disability by calculating the effect that factors such as age, education, and training, in addition to his permanent physical impairments, had on his wage-earning capacity and his ability to compete in a competitive job market. We have previously held that the Commission's adoption of a medical panel's findings of physical impairment, without further evaluation of the effect which that impairment, when combined with other factors, might have on a claimant's wage-earning capacity, constitutes a failure by the Commission to carry out its administrative responsibilities under the well-recognized odd-lot doctrine. *See Norton,* 728 P.2d at 1027; *Hardman v. Salt Lake City Fleet Management,* 725 P.2d at 1326. In short, the Commission's findings on disability are therefore inadequate to support a denial of permanent total disability benefits.

III.

In sum, we hold that the Commission's finding that Peck "was able to work effectively in his job for about a year after his injuries" and that he "just plain retired," are unsupported by the evidence and must therefore be set aside. We also hold that the denial of permanent total disability benefits is unsupported by the Commission's findings of fact. Accordingly, we reverse and remand this case to the Commission for further proceedings consistent with this opinion, including a reassessment of disability and a recomputation of benefits based on permanent total disability.

WE CONCUR:
Gordon R. Hall, Chief Justice
Richard C. Howe, Justice
Christine M. Durham, Justice
Michael D. Zimmerman, Justice

1. The fact that Peck retired is, of course, true. If that is all that the Commission meant by its finding, it would have little significance. However, we read the finding to indicate that the Commission believed that Peck retired because he simply desired to do so rather than being, in effect, compelled to do so.

Cite as
73 Utah Adv. Rep. 31

IN THE SUPREME COURT OF THE STATE OF UTAH

AMERICAN SALT COMPANY, a Delaware corporation,
Plaintiff,
v.
W. S. HATCH COMPANY, a Utah corporation; the Public Service Commission of Utah; Brent H. Cameron; James M. Byrne; and Brian T. Stewart,
Defendants.

No. 860048
FILED: December 31, 1987

Original Proceeding in This Court

ATTORNEYS:

Charles M. Bennett, Salt Lake City, for Plaintiff

Merlin O. Baker, Salt Lake City, for W. S. Hatch Co.

David L. Wilkinson and Bernard M. Tanner, Salt Lake City, for Public Service Commission

HALL, Chief Justice:

American Salt seeks review of a Public Service Commission (PSC) order dismissing its verified complaint.

American Salt harvests salt from the Great Salt Lake. By early 1984, the surface of the lake had risen to such a level as to endanger American Salt's ability to recover sufficient amounts of salt to satisfy its markets. In order to supplement its inventory, American Salt purchased additional salt from Amax.

In April 1984, American Salt contacted W. S. Hatch Co. (Hatch), a Utah common carrier,[1] about transporting the purchased salt from Amax to American Salt's processing plant. After physically inspecting the hauling route, Hatch entered into an agreement with American Salt pursuant to which Hatch would be paid less than its applicable general tariff (its general commodity tariff) for each of the eleven-mile hauls.

Approximately four miles of the eleven-mile route were over a public road. Accordingly, the hauls were subject to the jurisdiction of the PSC.[2] However, Hatch neither requested nor received PSC approval prior to the hauling to charge a point-to-point rate (a special commodity rate).

Pursuant to the parties' agreement, Hatch hauled salt from April 16 until May 2, 1984. Subsequently, a dispute arose between the parties, and Hatch brought suit in federal district court to recover hauling charges based upon its general commodity tariff.

American Salt then filed a verified complaint with the PSC that sought relief from the imposition of Hatch's general commodity tariff. This request for relief was based in part on the fact that Hatch had made several special commodity rate salt hauls for American Salt's competitor, Morton Salt. The thirty-mile Morton Salt hauls followed a route that included the eleven-mile American Salt route. Hatch charged Morton Salt less than its general commodity tariff.

Hatch in turn filed a motion with supporting affidavits seeking dismissal of the complaint. In September 1985, the administrative law judge who heard Hatch's motion filed his report and proposed order, which included findings of fact and conclusions of law. The report and order, which granted Hatch's motion, were adopted by the PSC, and a subsequent application for rehearing was denied.

American Salt contends that the PSC had the authority and duty to grant its requested rate relief. It first claims that application of Hatch's general commodity tariff in this case is unreasonable and unjust because (1) Hatch will recover a windfall profit, (2) having Hatch haul the salt at the general commodity rate makes no "economic sense" since the hauling charges will cause the cost of the salt to exceed its retail value, and (3) Hatch told the PSC that a lower rate was just and reasonable with respect to the Morton Salt hauls, and the PSC allowed Hatch to charge Morton Salt a special commodity rate. American Salt claims that by denying its requested relief, the PSC allowed Hatch to charge an unjust and unreasonable rate in violation of state law.

The findings of fact and conclusions of law provide in part:

> FINDINGS OF FACT
>
> The Commission finds that there is no genuine issue as to the following material facts:
>
> 1. The haul performed by Hatch for American Salt was made, in part, over a public road of the state of Utah.
>
> ....
>
> 4. At the time of the haul, Hatch had a salt tariff on file that had been properly submitted to and approved by this Commission.[3] The Public Service Commission has